

(2005)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DISABILITY LAW CENTER,
KATHERINE C., AND
ANTHONY M.,

CASE NO. 2:17-CV-748

PLAINTIFFS,

VS.

THE STATE OF UTAH, THE UTAH
JUDICIAL COUNCIL, AND THE
UTAH ADMINISTRATIVE OFFICE
OF THE COURTS,

SALT LAKE CITY, UTAH
NOVEMBER 1, 2017

DEFENDANTS.

DEFENDANTS' MOTIONS TO DISMISS
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:00 P.M.)

3 THE COURT: Good afternoon, everyone. We'll call
4 case number 2:17-CV-748. This is our Disability Law Center
5 versus State of Utah, etcetera case. We have a whole cadre of
6 lawyers here today, always a great pleasure as you can
7 imagine. Many of you are familiar to me, but why don't we
8 make appearances, should we.

9 MR. VIRGIEN: Your Honor, Kyle Virgien, Latham
10 Watkins, for the plaintiffs.

11 THE COURT: Will you say your last name one more
12 time.

13 MR. VIRGIEN: Virgien.

14 THE COURT: Thank you.

15 MS. SCHRANZ: Your Honor, Dorottya Schranz of Latham
16 Watkins for the plaintiffs.

17 THE COURT: Thank you.

18 MR. DYMEK: Andrew Dymek for the State of Utah.

19 MR. WOLF: David Wolf, State of Utah.

20 MS. THOMPSON: Laura Thompson for the State of Utah.
21 We have a staff member seated with us at the table.

22 MS. SYLVESTER: Nancy Sylvester for the AOC and the
23 Council.

24 MS. FARRELL: Leah Farrell from the ACLU for the
25 plaintiffs with John Mejia.

1 THE COURT: Thanks, and welcome to all of you,
2 especially those of you who are from out of state and haven't
3 been with us before.

4 This is the time set for hearing on two motions to
5 dismiss filed by the defendants, dockets 36 and 42, and the
6 plaintiffs' motion for preliminary injunction, docket number
7 8. There are motions to supplement the record, notices of
8 supplemental authority, and a motion to strike that,
9 evidentiary objections as well.

10 As is almost always the case, as is our practice, we
11 spent a great deal of time preparing for the hearing today and
12 have prepared a preliminary orientation to help focus our
13 argument in this case, substantially narrow our argument I
14 think.

15 Let me just remove all the mystery and then let's get to
16 it. I don't think I have jurisdiction based on the
17 allegations in the complaint, and even if we reach into the
18 facts in the supplemental declarations. The starting point
19 for any federal court, of course, is jurisdiction, and it's
20 the plaintiffs' burden invoking the court's jurisdiction to
21 establish jurisdiction.

22 Here, standing I think is the threshold issue that we
23 can't clear, at least initially. Let me share with you my
24 thoughts about why that is. And what I have in mind is that
25 it's not fatal to the merits of the claim but that we need to

1 start with a new pleading probably.

2 I don't think that the individual plaintiffs have -- I
3 don't think the plaintiffs have alleged facts in the complaint
4 that establish an actual or imminent injury for these
5 plaintiffs. And I'm mindful of course that this is a --
6 there's not a bright-line here. There can come a time when
7 you have a reasonable apprehension of injury that's sufficient
8 for Article III standing. My judgment is that we fall short
9 of that here, that we need something more than a reasonable
10 apprehension and fear.

11 Even reading the plaintiffs' cases submitted in the
12 papers in support of standing of the individual plaintiffs,
13 those cases all have at least one plus factor that's -- I just
14 made that up. That's not a word in these cases, but something
15 more than just apprehension, either some specific injury or
16 that apprehension has caused them to take some action or step
17 that has resulted in some injury, and that -- there is no
18 allegation of any impact either on their behavior or specific
19 injury for the individual plaintiffs, at least I didn't see
20 it. I will tell you I looked very carefully, so I don't think
21 that's there. I do think it's required.

22 If we're right about that, and neither of the named
23 plaintiffs have demonstrated standing on this record, then
24 there's still a basis to proceed if the Disability Law Center
25 can establish associational standing especially.

1 Organizational standing is a different question.

2 And associational standing is complicated I think in this
3 context. It's not super clear. And there may be even -- I
4 recognize the authority from the Eleventh Circuit that the
5 plaintiffs cite. I think there may be some question about
6 whether, given the statutory grants here, whether there needs
7 to be a showing to satisfy the Hunt factors.

8 This is what I think. Our best reading of the case law,
9 and the one that makes the most sense to me, is that a
10 plaintiff seeking to proceed under these statutes with
11 associational standing still must identify at least one
12 plaintiff by name, and not as a technical pleading
13 requirement, though that's part of it, but really so that we
14 can ensure that we have satisfied Article III standing
15 requirements of an actual injury.

16 If we think of the Hunt factors -- I'm making this part
17 up. This is my own conception of how this would work, this
18 framework would work. I don't see this in a case. But if we
19 think of the three Hunt factors, I think I would agree with
20 the Eleventh Circuit in part that these statutes -- these
21 statutory grants from Congress probably cause us to disregard
22 the third Hunt factor. We probably just don't even reach it.
23 And my best instinct about it is that these statutes would be
24 a factor that would weigh in favor of a showing under the
25 second factor.

1 But we're still left with the requirement that a party
2 demonstrate an actual, imminent harm, an injury, that we have
3 a real case in controversy, not a hypothetical or theoretical
4 case. And unless we have some person, a specific person,
5 identified who can make that showing, I don't see how we could
6 cross the line, remembering that it's the plaintiffs' burden
7 to establish jurisdiction and standing. I don't think -- I
8 don't think it could be done.

9 And there's language in the Supreme Court decision -- why
10 am I blanking on the name now? The recent Supreme Court case
11 there's language about having to have named a specific -- here
12 it is. It's from the Summers case, the 2009 decision. This
13 is a quote that organizations seeking to sue under
14 associational standing must make specific allegations
15 establishing that at least one identified member has suffered
16 or would suffer harm. And I'll acknowledge that's not
17 a -- that's not a holding, it's just language in the case, but
18 it makes sense to me when I think about Lujan and I think
19 about Hunt.

20 There's another question here that's not really fully
21 fleshed out in the papers and that is the question about what
22 a court considers in evaluating the record and the showing for
23 standing at this stage of the proceeding. And I don't -- I
24 think that parties can supplement the complaint with evidence
25 to establish standing. There's no requirement you plead

1 standing, certainly not Rule 9 sort of stuff, so I don't think
2 you have to anticipate a standing challenge and plead it in
3 the first instance. I think you could come in with evidence
4 to establish standing.

5 So I think we reach the declarations. And let's set
6 aside the evidentiary concerns about the declarations for a
7 moment. I think they're insufficient to establish standing
8 for a couple reasons. Number one -- and I want to say again,
9 I construe -- I read them carefully, the allegations in the
10 declarations, but I construe them narrowly because it's the
11 plaintiffs' burden to demonstrate standing, and I don't think
12 those allegations on their face establish any of these things:
13 Number one, any specific individual; number two, that any
14 person who was in one of those proceedings was otherwise a
15 constituent of the Disability Law Center. That statement is
16 not there. I see it could be inferred. It's not noted.
17 Nobody says that's the case.

18 There's another question that arose in the context of the
19 declarations, and that is, well, did any injury result? Which
20 raised a general question about the complaint and the nature
21 of the rights that are allegedly at issue. Do those rights
22 attach to every part of a guardianship proceeding? So if
23 somebody was in court and saw a hearing and somebody was there
24 assuming they were a constituent of the DLC, and they didn't
25 have counsel, is that itself an injury? Or are there certain

1 parts of the guardianship -- for example, what if that was a
2 scheduling conference. I'm just making this up because it's
3 not stated in the declaration. Is that still an injury? Is
4 it a constitutional injury not to have counsel there or does
5 the court have to take some substantive action in the course
6 without the benefit of counsel for the subject of the
7 guardianship proceeding? The declarations of course tell us
8 nothing about what those proceedings were, which may be a
9 problem. I think it is a problem for showing an actual
10 injury.

11 There was at least one more and now it's skipped my mind
12 as we're talking. For those reasons I think the complaint and
13 the evidentiary submissions are insufficient to establish
14 associational standing for the Center.

15 I think I largely disagree with the State's argument
16 about organizational standing. Again, I'm using my words not
17 the words of the State, but I read the essence of the State's
18 argument about organizational standing to be a complaint that
19 the Center had not alleged specifically enough who it had
20 helped and when and in what capacity and how, but I read that
21 as sort of arguing for something more than Rule 8 notice
22 pleading, and I don't think that's required here. I think --
23 I think the allegations in the complaint are probably
24 sufficient in my view to give rise to organizational standing
25 for the Center.

1 But that raises a different problem. The Center, if it's
2 proceeding only in an organizational capacity, doesn't have
3 any injuries related to the claims. And the Center is not a
4 person with a disability under the ADA. It's not a person I
5 don't think who suffers a Rehabilitation Act injury and is not
6 claiming a Fourteenth Amendment injury in some way.

7 So then I think there's a disassociation between the
8 Center and the claims. That only results if I'm right about
9 the first cards falling the way that I have in mind. Which
10 really suggests to me that we just have a pleading issue if we
11 get to that point.

12 So those are just my preliminary thoughts about it. I
13 have prepared a preliminary oral ruling, but as I often say --
14 Mr. Virgien, you're in the first seat. I'll just -- I come
15 out with an open heart and an open mind. I may have
16 misunderstood things or misread the cases. I'll gladly hear
17 anything you'd like to share about how I just have it wrong.

18 MR. VIRGIEN: Thank you, Your Honor. Should I
19 proceed now or I know we're opposing the motion?

20 THE COURT: Well, since my preliminary orientation
21 is not favorable to you, let me invite you to come to the
22 podium, would you?

23 MR. VIRGIEN: Thank you for that invitation, Your
24 Honor. I would like to start in the first instance by noting
25 that we did request leave to amend the complaint.

1 THE COURT: Right.

2 MR. VIRGIEN: I don't think that there's any
3 prejudice here as we've stated our allegations clearly. This
4 is an issue of form rather than substance. So we would like
5 to --

6 THE COURT: Not entirely. I mean the allegations
7 are going to support jurisdiction or not, but that's
8 substantive. I understand what you mean though I think.

9 MR. VIRGIEN: As to notice at least I think we can
10 agree that there's -- the defect does not get to notice.

11 THE COURT: Agreed.

12 MR. VIRGIEN: I'd like to start with organizational
13 standing, where Your Honor left off. Your Honor did agree
14 with us that organizational standing is a valid theory here
15 under which the Center may proceed. And although Your Honor
16 stated that the Center has not alleged a Fourteenth Amendment
17 or ADA or Rehabilitation Act harm, I think at least as to the
18 constitutional claims that harm is clear. The Center has
19 suffered a deprivation, as we allege, in that it's unable to
20 carry out its mission through the Guardianship Signature
21 Program, and also that it needs to deal with the fallout of
22 all of these deprivations, and that is a constitutional harm
23 as to the Fourteenth Amendment.

24 THE COURT: Well, those are alleged injuries. What
25 Fourteenth Amendment right is it that the Center has that is

1 injured?

2 MR. VIRGIEN: Well, here the right is, Your Honor
3 has recognized, is via the Center's constituents, however, the
4 Center certainly has alleged a right to carry out its mission
5 of advocacy for its constituents.

6 THE COURT: Well, in fact it's its charge, but does
7 that give rise to constitutional rights?

8 MR. VIRGIEN: I think that if Your Honor looks at
9 the case law on the organizational standing issues, for
10 example Havens Realty is the leading Supreme Court case here,
11 there it's exactly the same issue we're facing here. The
12 organization in Havens Realty was an antidiscrimination
13 organization. And that organization was suing as an
14 organization because its -- its -- the people on whose behalf
15 it was advocating had suffered constitutional deprivations.

16 I don't know that in the sense that Your Honor is looking
17 to have the -- the organization itself have some right to
18 counsel that it itself lost, I think the same thing applies
19 there, that the organization in Havens Realty did not itself
20 suffer racial discrimination. It just suffered an
21 organizational harm because individuals had suffered racial
22 discrimination.

23 THE COURT: Okay.

24 MR. VIRGIEN: Going along to the --

25 THE COURT: Let me ask you though, Mr. Virgien,

1 if -- if you fail to persuade me that on this record the
2 individual plaintiffs have established standing or that the
3 Center has established a basis to proceed under associational
4 standing, the question about the organizational standing --
5 well, I see your point. But if you don't -- if you don't
6 prevail on those other issues, you'd rather amend anyway,
7 wouldn't you?

8 MR. VIRGIEN: Absolutely.

9 THE COURT: Right. So -- well, okay, go ahead.

10 MR. VIRGIEN: All right. Turning to associational
11 standing, I wanted to address the Summers case that Your Honor
12 was relying on. In the Summers case it dealt with a somewhat
13 different issue from what we're facing here. That case I
14 believe dealt with the Sierra Club and some other
15 environmental organizations whose members -- who allege that
16 their members enjoyed going to Sequoia National Park and might
17 happen upon a particular parcel of that park that was being
18 regulated by the Forest Service in a particular way.

19 Here -- and in that -- under those circumstances it is
20 quite reasonable to require an allegation of a particular
21 individual who is harmed, otherwise those allegations really
22 were speculative. Here the -- there are fewer jumps that one
23 needs to take to get to a harm. Here there are guardianship
24 proceedings that are happening with some regularity. All
25 disabled Utahns are constituents of the DLC. So when a

1 guardianship proceeding occurs and counsel -- the guarantee of
2 counsel is denied, that is a necessary harm that is
3 necessarily happening.

4 THE COURT: Well, is it? I wondered about this.
5 What about -- I think -- I think the way you just said it that
6 may be true. The way I read the papers, and especially I
7 think the preliminary injunction papers, suggested to me
8 something broader in scope than that. And this is probably an
9 imperfect example, but I thought about a six-year-old,
10 hypothetical six-year-old whose parents die, who leave an
11 estate, and there's a personal representative. That
12 six-year-old has money. For whatever reason the personal
13 representative comes to court and seeks a guardianship. That
14 person doesn't suffer any disabilities, except for age. Is
15 that person part of your constituency?

16 MR. VIRGIEN: That person is not part of DLC's
17 constituency, assuming that that person does not have any
18 disabilities.

19 THE COURT: So we need to know something. Don't we
20 need to know something about the identity of some person in
21 the guardianship proceeding to ensure that we have somebody
22 who you represent their interests at the Center who suffered
23 an injury?

24 MR. VIRGIEN: I don't know that the guardianship
25 statutes contemplate bringing a guardianship proceeding

1 against a minor who is not disabled though. The guardianship
2 proceedings that we're dealing with address the idea of
3 bringing a guardianship proceeding against someone who will be
4 of age of majority who is disabled. The State mentioned some
5 cases where someone might be a practicing attorney and have a
6 frivolous proceeding brought against him. In those kinds of
7 cases we might have an issue here, but I think in the large,
8 large majority of cases this person is going to be a DLC
9 constituent by virtue of the statutory mandate.

10 THE COURT: How do you think we'll ever assure
11 ourselves of an actual injury, an actual controversy unless we
12 identify somebody? It's not an overly burdensome requirement,
13 coincidentally, I don't believe, but how will we know for
14 sure? And it's a significant issue, jurisdiction.

15 MR. VIRGIEN: Understood, Your Honor. Just to back
16 up and to provide a little bit of context for the burden of
17 that requirement, not that it's one we would not seek to meet
18 were we granted leave to amend, it is difficult given the
19 circumstances here to identify by name individual people that
20 have suffered a deprivation. Your Honor has granted a motion
21 to proceed pseudonymously in this case that I think raised a
22 lot of these issues.

23 These are sensitive medical diagnoses, sensitive topics.
24 And here to be a named person or a named plaintiff in this
25 case requires a lot of courage and requires a lot of

1 understanding from the family members here too. You know,
2 we're talking about -- if we're talking about someone who has
3 already been placed under a guardianship without counsel, this
4 is someone who has now had their legal person stripped away
5 who needs to work with their family members to challenge that
6 legally. It's not a small undertaking. It's one we'd attempt
7 would the Court allow us leave to amend, but this is not
8 merely a matter of form here.

9 THE COURT: So I think what you're suggesting is
10 that you can meet your Article III requirement by inference.
11 There are -- there's a class of people, there's a certain kind
12 of proceeding that happens, and it happens with this class of
13 people, and so -- I never speak Latin in the courtroom -- but
14 ipso facto there must be standing. There was an injury.

15 MR. VIRGIEN: Yes, Your Honor, that's the argument
16 that we lay out in the complaint, and we think it is
17 sufficient here. And if the Court were to request that we
18 amend to actually state that someone at the DLC has observed a
19 particular instance where someone has been deprived of counsel
20 or something, that would be -- we'd be more than happy to do
21 that. It's the naming of a specific individual that presents
22 some level of burden that I don't think is necessary here. At
23 any rate --

24 THE COURT: Do we need to have such a person in
25 these kinds of cases -- by these kinds of cases I'm thinking

1 about associational standing cases, not necessarily the
2 subject matter of this case -- so that we can test the
3 sufficiency of the showing of both the apprehension or the
4 harm or the injury and the controversy?

5 MR. VIRGIEN: For purposes of standing?

6 THE COURT: Right.

7 MR. VIRGIEN: Not in a case like this.

8 THE COURT: Couldn't there be -- couldn't there
9 be -- surely some of those cases that the State points out
10 that -- an example with the fraudulent guardianship
11 proceeding. There might -- there will be others I suppose
12 where the subject of the guardianship proceeding wishes to
13 proceed without a lawyer. Or you can imagine other facts that
14 would lead to a conclusion if we just examined that person, if
15 that person came to court, we'd say, oh, you don't belong here
16 because you haven't suffered an actual injury for example or
17 some other reason. Don't we need something specific in this
18 cloud of people? You keep telling me no, but it's just a way
19 of posing a question.

20 MR. VIRGIEN: No, understood. And we would take
21 issue with some of those hypotheticals, but I'll leave that
22 aside for now. In this case really the Court does not need
23 that kind of specific person to point to because this is a
24 facial challenge that is addressing a law that is stripping
25 away a whole class of people's rights, and it's not really

1 doing it in a fact specific way. There's a -- ADA has a
2 requirement for reasonable accommodation here that applies
3 across all people.

4 For example the guardianship respondent who would waive
5 that right to counsel still has a right under the ADA to get
6 to a place where that respondent can knowingly and
7 intelligently waive that right to counsel. And that would
8 involve a conversation with counsel where counsel would
9 explain the very real consequences.

10 Many guardianship respondents just don't understand going
11 in that this is not merely a matter of their parents getting
12 some kind of temporary control over their lives but this is a
13 permanent lifelong appointment, and when their parent dies,
14 the guardianship will pass on to someone that the State
15 appoints. These are the kind of questions that someone really
16 needs to know -- needs to have the question posed and then
17 needs to be able to answer before they can even get to the
18 point where they could waive that right to counsel.

19 THE COURT: What about -- I don't want to steer us
20 too far away from -- we'll circle back to standing in a
21 moment, but it raises this question. When I think about the
22 relief that I think is sought in the preliminary injunction
23 motion and I read that in -- and I juxtapose what I think
24 you're asking for more generally in the complaint, do we have
25 a different class of constituents who have different interests

1 in the complaint -- the claims generally in the complaint and
2 those in the preliminary injunction?

3 MR. VIRGIEN: Yes, that's correct, Your Honor. I'll
4 let -- Ms. Schranz is arguing the P.I. motion so I'll let her
5 explain that more fully, but that's correct. It's just the
6 merits of the case on the P.I. motion are the same. We're
7 just seeking a more limited remedy that would only apply to a
8 sub --

9 THE COURT: Subset of.

10 MR. VIRGIEN: Of the Plaintiffs' -- or of the
11 constituents in the case.

12 THE COURT: Those that meet the five statutory
13 elements.

14 MR. VIRGIEN: That's absolutely correct.

15 THE COURT: What implication, if any, do you think
16 there is for standing?

17 MR. VIRGIEN: There's no implication for standing
18 there. This is really a question of a narrow remedy. The
19 merits -- like I said, the merits of the case are not
20 different. We're not arguing that somehow there's a different
21 likelihood of success on the preliminary injunction motion for
22 example. It's merely, you know, on a preliminary injunction
23 motion the remedies that are status quo -- reverting to the
24 status quo are preferred, and we think that's just a more
25 appropriate intermediate remedy while we resolve the merits of

1 the case.

2 THE COURT: So that's I think how I was viewing it
3 too, but I wanted the benefit of your thoughts. It seemed to
4 me that the threshold standing requirement based on the claims
5 that are broader in scope in the complaint are -- require
6 somebody -- once somebody has satisfied that, we know that
7 we've got people who can proceed with the claims in the
8 preliminary injunction.

9 MR. VIRGIEN: I think that's correct.

10 THE COURT: We'll come back to associational
11 standing. You were making good progress and I keep --

12 MR. VIRGIEN: Thank you, Your Honor. At any rate,
13 yeah, I think I was discussing Summer. I was explaining that
14 if we apply the Summer court's rule here to our case, it's
15 very much distinguishable, and I don't think that rule
16 requires the identification of any particular individual
17 because here the deprivation is -- is more simple and it's a
18 more facial type of deprivation in that every single person
19 who goes through a guardianship proceeding, of which there are
20 undisputedly many in the State of Utah, is a DLC constituent
21 and does suffer these harms under the ADA and under the
22 Constitution. So it's -- it doesn't quite require the same
23 type of individual naming that the Supreme Court suggested it
24 would require in Summer.

25 THE COURT: And the authority on the other side that

1 you point to for the proposition that you affirmatively need
2 not have such a person is the Eleventh Circuit case?

3 MR. VIRGIEN: That's correct, the Eleventh Circuit
4 case. And it is -- I think there are a couple of Supreme
5 Court cases as well that -- that require no naming of a
6 particular individual. Even the cases that the defendants
7 cite for the most part don't require someone be named. They
8 require that someone be included in the membership of the
9 organization but that's as far as they go.

10 Does Your Honor have any further questions about
11 associational standing or shall I move on?

12 THE COURT: Give me just one moment, please.

13 MR. VIRGIEN: Absolutely.

14 THE COURT: Thank you.

15 (BRIEF PAUSE)

16 Go ahead.

17 MR. VIRGIEN: I also wanted to briefly touch on Your
18 Honor's points about the individual plaintiffs' standing here.
19 Your Honor mentioned a rule where someone has to take some
20 kind of preventative action in order to claim an injury. I
21 just want to be careful that we're not drawing a distinction
22 here that allows a company to have standing in a way that an
23 individual asserting a non-pecuniary harm cannot.

24 The cases that Your Honor points to that we cited tended
25 to involve companies who were able to book on their balance

1 sheet a contingent liability. You know, maybe there's a 50
2 percent chance that a particular proceeding would be brought,
3 therefore, they can book half of the liability they'd face in
4 that proceeding.

5 Here we're dealing with something different where it's an
6 individual who is facing a far more severe constitutional
7 deprivation. And the fact that they might not be able to book
8 that to take into account the probability it might happen I
9 don't think should diminish their standing here.

10 THE COURT: No, but my reading even of your cases
11 that -- I mean we could think of the Oklahoma license plate
12 case for example. So there's a person. There's a
13 constitutional right at issue. It's a First Amendment right.
14 But that litigant was confronted with a dilemma, a choice to
15 make, either don't exercise my First Amendment right, speech
16 right, or do exercise that right and then risk some
17 proceeding. And so in that instance for example you have an
18 important right but you're confronted with a choice to make.
19 None of these plaintiffs are alleging that they're making any
20 choice or have impacted any of their decision-making as a
21 result of this apprehension, have they?

22 MR. VIRGIEN: No, they've not alleged that in the
23 complaint, Your Honor.

24 THE COURT: We had another case here -- I think
25 Mr. Mejia might have been involved in another case we had

1 involving a First Amendment right and somebody who had been
2 prosecuted under a statute but then those claims had been
3 dismissed. And you don't have to go get arrested again if you
4 have a reasonable apprehension. And if you're -- if you feel
5 you can't go exercise your First Amendment right for fear that
6 you'll be arrested again, then you've changed your conduct
7 again. That's the sort of thing I think I'm looking for.

8 I'm not sure -- so I agree with you about corporations,
9 but let's talk about our folks here. Nothing more than just a
10 generalized fear is enough?

11 MR. VIRGIEN: I have two points in response to that,
12 Your Honor. First, for the First Amendment for the Oklahoma
13 license plate case, I read that case to say that -- so Your
14 Honor points to a change in his behavior, he decided not to
15 exercise his First Amendment right. I read that case to say
16 that he would still have standing if he chose to exercise his
17 First Amendment right, or rather kept exercising it, did not
18 change his behavior in any way and just happened to not have
19 been prosecuted.

20 And that's kind of what we have here. We have the person
21 carrying on his and her behavior without any government
22 deprivation, but still the imminent likelihood of that
23 deprivation hanging over his or her head.

24 THE COURT: Well, we haven't established imminent
25 likelihood either, have we? Generalized fear I think is what

1 we have. There are facts, one or two, in support of the
2 reasonableness of the apprehension, but that still doesn't
3 tell us anything about the imminency -- is that a word? Of
4 the harm that's feared.

5 MR. VIRGIEN: I think that that's a disagreement
6 that we have with the Court. We certainly think that those
7 facts do support imminency but I understand Your Honor to be
8 saying otherwise.

9 THE COURT: So what's the limiting principle then in
10 support of the position you're taking? What else needs to
11 happen besides the State passes a law that concerns me as a
12 citizen, and now I'm really worried that I'm going to be
13 affected by it? Now do I come to court and just say I'm
14 really worried I'm going to be affected by this law, and it's
15 reasonable for me to be because now I'm in violation of the
16 law? There's a whole history of cases explaining that's not
17 sufficient.

18 MR. VIRGIEN: But I think that if there is -- if
19 facts are pled that support a reasonable fear -- and we're not
20 talking some abstract fear, but a reasonable likelihood that
21 this will happen, which our complaint does -- does support.
22 Katherine for example has already had deprivations at the
23 hands of the State. Her parents have expressed concern for
24 her ability to care for herself.

25 THE COURT: Except that nobody has initiated a

1 guardianship proceeding in either of those instances.

2 MR. VIRGIEN: That's correct, but were that to
3 happen, there would simply not be enough time to -- to have
4 this judicial process occur.

5 THE COURT: I mean but now we're just squabbling
6 about what inference we should draw from past experience, but
7 it's just as reasonable to say, well, it's evidence that your
8 situation isn't one that results in a guardianship proceeding
9 because it's happened before and nobody initiated one. You'll
10 disagree with that but who is to say?

11 MR. VIRGIEN: Your Honor, on a Rule 12 motion I
12 think that respectfully we are allowed to draw reasonable
13 inferences.

14 THE COURT: I don't think in this instance though,
15 right, because aren't you trying to establish standing, which
16 is your burden?

17 MR. VIRGIEN: It is our burden but based on the
18 allegations of the complaint.

19 THE COURT: And facts. Do you think that we draw
20 inferences from the facts in the complaint in your favor to
21 establish standing, which is your burden, not in the Rule 12
22 motion to dismiss context but evaluating the sufficiency of
23 your jurisdictional showing? Do you think we fill in the gaps
24 for a plaintiff who has a burden to establish standing?

25 MR. VIRGIEN: We do not fill in the gaps, Your

1 Honor. But where the defendants have not put facts into the
2 record that controvert the facts of the complaint, we -- we
3 presume the facts of the complaint to be true.

4 THE COURT: I agree with that. But also inferences
5 you think drawn in your favor in that context?

6 MR. VIRGIEN: I don't want to overstate my position.
7 I think that inferences that can be reasonably drawn from the
8 facts alleged in the complaint, yes.

9 THE COURT: At this stage? Standing could be
10 challenged again later --

11 MR. VIRGIEN: Uh-huh.

12 THE COURT: -- after discovery for example, then do
13 you think you have a different evidentiary burden?

14 MR. VIRGIEN: Yes, if it were on -- after discovery
15 the evidentiary burden would change presumably because facts
16 would be introduced on all of these factual questions.

17 THE COURT: Okay. All right. I steered you away
18 somewhere. You were explaining why the individual plaintiffs
19 have demonstrated enough.

20 MR. VIRGIEN: Right. I also want to point the Court
21 to an opinion of this district court that we cited in our
22 briefing, although for a different purpose, if Your Honor will
23 indulge me.

24 THE COURT: Of course.

25 MR. VIRGIEN: The opinion is Uroza v. Salt Lake

1 County. That case involved a question -- or a challenge,
2 rather, to standing for prospective injunctive relief. This
3 was a person who had suffered a deprivation. He had been
4 incarcerated. That was his deprivation. And then he'd been
5 released and he was -- he was out. And basically he would
6 continue to suffer this deprivation if he were picked up again
7 by the police. It was a case involving mandatory detention
8 for immigration purposes.

9 So the argument there was, well, this is someone who is
10 out who is going about his daily life and who is not currently
11 in custody and can't really point to a particular fact
12 supporting that he -- the idea that he would be put back into
13 custody. But the court found that in that case enough -- it
14 was enough to say that he had suffered in the past some --
15 some procedures, some deprivations and had a reasonable fear
16 that he would be arrested again. Once he was arrested again
17 that would kick off this whole series of constitutional
18 violations, and that that was enough to support standing for
19 injunctive relief.

20 Here, if we look at Katherine, she has exactly the same
21 set of facts. She suffered some deprivations in the past, not
22 the guardianship proceeding, but she has been
23 institutionalized by her parents. If her parents choose to
24 bring this proceeding in the future, it will kick off kind of
25 a chain reaction of facts that will lead inexorably to her

1 being denied her guarantee of counsel.

2 THE COURT: Are we sure about that? I mean we
3 didn't get into this yet in our discussion, but isn't there --
4 doesn't there still exist the possibility that the state court
5 judge will appoint counsel in the proceeding?

6 MR. VIRGIEN: There does, yeah.

7 THE COURT: And in that case has she suffered the
8 harm that's contemplated in the complaint?

9 MR. VIRGIEN: She has suffered a constitutional harm
10 that's been contemplated in the complaint, Your Honor, because
11 the State has not paid for that counsel. That's something
12 that we're alleging is required under the ADA because the
13 State must pay for accommodations, and under the 14th
14 Amendment because the State must pay for indigent defendants,
15 or respondents in this case.

16 THE COURT: You're pointing to Gideon you mean.
17 You're talking about in a criminal context, the second thing
18 you said, no?

19 MR. VIRGIEN: We've dismissed our Sixth Amendment as
20 incorporated by the Fourteenth Amendment claims, but under the
21 due process -- procedural due process guarantee there is still
22 a guarantee that the State pay for counsel for indigent
23 people.

24 THE COURT: What if -- what if the Court appoints
25 pro bono counsel for her?

1 MR. VIRGIEN: That's still a violation of the ADA's
2 requirement that the -- that the State pay for the counsel.
3 At this stage she's still facing a violation.

4 THE COURT: I didn't follow that part at all, I'm
5 sorry. If the -- if the thing -- if the reasonable
6 accommodation is provided at no cost to her, that's still an
7 infringement is what you're saying?

8 MR. VIRGIEN: It still can be a violation of the
9 ADA. Now, the State might argue that that is a reasonable
10 modification of its program but that's a fact dispute we would
11 have to deal with on the merits.

12 THE COURT: And so if we don't presume the outcome
13 of that line of questioning, isn't this another example of a
14 deficiency in showing an actual, imminent Article III
15 controversy, at least with respect to Katherine? We don't yet
16 know whether there's a set of circumstances, dominos that
17 would fall, that would eventually ring the bell? Aren't there
18 a host of dominos in between the allegations in this complaint
19 as it's set forth and that injury?

20 MR. VIRGIEN: Your Honor, the complaint does allege
21 that there is a high likelihood that she would suffer this
22 deprivation were she placed into guardianship proceedings.

23 THE COURT: Coincidentally, that's a -- that's not a
24 factual allegation that the Court can accept as true at this
25 stage of the proceeding, is it? That's a -- that's not a

1 statement of fact. That's a generalized statement. That's a
2 conclusory statement, is it not?

3 MR. VIRGIEN: That's a fair point, Your Honor.

4 THE COURT: So let's not consider that.

5 MR. VIRGIEN: Fair enough, Your Honor. This is --
6 this is a case where the key facts that I think will resolve
7 this issue are in the sole possession of the defendants.
8 Really the question that I think we need to answer to know
9 whether those dominos will all fall is what percentage of
10 guardianships where the person is eligible under the first
11 four prongs of H.B. 101 or the fifth prong, which is a little
12 bit more of a judgment call by the judge, where that prong is
13 exercised.

14 THE COURT: Are there any in the record before me?

15 MR. VIRGIEN: Where a judge has exercised that
16 discretion?

17 THE COURT: Where we've come to that part and
18 somebody has either been deprived counsel or required to pay
19 for it themselves?

20 MR. VIRGIEN: In the context of the P.I. motion
21 there is a declaration that gets to that fact. In the context
22 of this motion, no.

23 THE COURT: Right. But now I've allowed myself to
24 get twisted. We were talking about the individual plaintiffs.
25 But there's nothing in the record before us about that for

1 either of these folks because of course they haven't yet begun
2 to knock down the first domino?

3 MR. VIRGIEN: That's correct, Your Honor.

4 THE COURT: Is that the wrong way to be thinking
5 about it for the individual plaintiffs do you think?

6 MR. VIRGIEN: The idea that since they haven't
7 knocked down the first domino, we --

8 THE COURT: Even if I'm wrong about the -- even if
9 I'm misreading the cases that talk about actual or imminent
10 harm, do we need something more in this case to provide -- to
11 demonstrate individual standing for any of these folks?

12 MR. VIRGIEN: Something more that indicating that
13 once we enter the Court proceeding --

14 THE COURT: That the harm that they're concerned
15 about will ever actually materialize because they won't be
16 appointed a lawyer or they will be required to pay for it?

17 MR. VIRGIEN: Well, I think I would fall back on the
18 point I made earlier, that there's still a violation even if
19 they are -- even if they're provided counsel under some
20 circumstances.

21 THE COURT: So let me press you on that point. If
22 I'm candid, I don't fully understand that. What is the harm?
23 If the court -- if the court supplies pro bono counsel for
24 them, for Katherine -- say a guardianship proceeding is
25 initiated against her will. They go through -- well, let's

1 not even put it in the context of House Bill 101. Let's just
2 say that she's there and the Court appoints counsel for her at
3 no cost to her. What's the harm? What is the harm that's
4 contemplated in the complaint?

5 MR. VIRGIEN: Well, in terms of this being a
6 violation of the ADA or of the due process clause, I think
7 that there will be a factual question as to whether or not
8 adequate -- this is an adequate measure to protect her
9 interests, and that's a factual question we'll have to reach
10 down the road.

11 THE COURT: Under the ADA I think is what you said
12 before. What would be the constitutional question?

13 MR. VIRGIEN: Well, the constitutional question
14 would still be whether it's an adequate procedural safeguard
15 under the Mathews v. Eldridge balancing test. But I think as
16 for standing it's a slightly separate question, which is have
17 we alleged a constitutional harm or a statutory harm? And in
18 that case I think the answer is yes. We don't reach the
19 merits of, you know, whether or not this is a reasonable
20 substitute procedure or something like that.

21 THE COURT: And you don't -- I think I agree that
22 ordinarily in this analysis we don't have to look to the last
23 domino. You can satisfy your standing inquiry without getting
24 that far, right.

25 MR. VIRGIEN: Uh-huh.

1 THE COURT: Okay. What else on standing? Anything
2 more?

3 MR. VIRGIEN: That's all I have on standing, Your
4 Honor.

5 THE COURT: We'll make sure you have a chance to
6 respond to what we hear from the State.

7 MR. VIRGIEN: Thank you very much, Your Honor.

8 THE COURT: Thank you.

9 Mr. Dymek, good afternoon.

10 MR. DYMEK: Good afternoon.

11 THE COURT: What was it we had wrong at the outset?

12 MR. DYMEK: I don't think you had anything wrong on
13 standing. I don't think it's remedial. And I don't think
14 there's a proper motion before the Court that would give them
15 leave to amend. But I think on the question of standing
16 you're absolutely correct, there's no standing in this case
17 and it should be dismissed on that basis.

18 THE COURT: What about associational standing, the
19 State's view about that? And Mr. Virgien says I have it all
20 wrong, at least with respect to -- well, with all of it, but
21 especially with respect to associational standing, that it's
22 just -- it is a matter of pure logic and math. There are
23 these proceedings, there are -- there are constituent groups,
24 and there are people who have to proceed without counsel.
25 Everybody in this courtroom and the whole state knows that

1 there are folks out there who are suffering this alleged harm.
2 Now, it may or may not be a harm, but there are people in that
3 bucket, and what sense does it make, he says, to impose a
4 requirement that we identify a specific individual under those
5 circumstances, even if it makes sense in other contexts? What
6 say you?

7 MR. DYMEK: The Summers court, the Supreme Court,
8 considered and rejected a very similar rationale. The
9 plaintiffs in Summers said we have a number of members who
10 enjoy these environmental features, and surely one of them
11 statistically, inferentially, must be damaged, must have
12 suffered an injury in fact. And the court specifically
13 considered that and rejected that, said it's insufficient.
14 And in the language you cited it instead said that the
15 plaintiff must identify someone with standing.

16 And that's necessary. It's not sufficient. You have to
17 plead the other parts of standing. And I think with respect
18 to everyone, Katherine, Anthony, and the unidentified people
19 especially, they haven't come close to hitting the other parts
20 of standing.

21 THE COURT: Let's think about this case in reverse.
22 Let's imagine a day, and I am not because we are a country
23 mile from resolving this question on the merits, but let's
24 suppose the case is resolved on the merits in favor of the
25 Center and its constituents. Let's imagine a world where a

1 federal district court articulates a constitutional right and
2 a statutory right to counsel in these proceedings and it has
3 to be provided without cost to the subject of the guardianship
4 proceeding.

5 Again, I'm not suggesting -- I have no idea whether
6 that's something that could happen in this case or not. If
7 that were the ruling of the Court, the State doesn't dispute
8 that there are people in the State of Utah right now who have
9 suffered those injuries that the Court would say flowed from
10 the deprivation of counsel. I didn't say that well, but do
11 you understand my question?

12 MR. DYMEK: Not exactly.

13 THE COURT: I'm turning the plaintiffs' burden on
14 its head for a moment. If this Court concludes that the
15 Fourteenth Amendment and these statutes require the
16 appointment of counsel without expense, and that the failure
17 to do so is a deprivation of the rights of these individuals,
18 if that's the finding of the Court at the end of the day, do
19 you disagree -- does the State seriously contend that there
20 aren't citizens in the state who would have suffered those
21 harms that the Court has said flow from the failure to appoint
22 counsel?

23 MR. DYMEK: And just so I understand, the harm being
24 not receiving paid-for counsel?

25 THE COURT: Well, counsel at no charge, whatever

1 form that takes.

2 MR. DYMEK: Okay. And that's the harm, not any
3 ramifications from that? Not, you know, receiving a
4 guardianship more restrictive than would have been had they
5 received counsel? Just not receiving counsel paid for by the
6 state?

7 THE COURT: And if I conclude that the Fourteenth
8 Amendment requires that and so does the ADA and the
9 Rehabilitation Act.

10 MR. DYMEK: That there have been some instances
11 where someone under House Bill 101 has not received paid-for
12 counsel?

13 THE COURT: Right.

14 MR. DYMEK: I think factually that has happened.
15 They cite to one instance it appears from during the pendency
16 of House Bill 101 where someone did not receive counsel. So I
17 think that has happened.

18 THE COURT: Are you referring to the declaration?

19 MR. DYMEK: The declaration. You know, we have some
20 evidentiary concerns with that, but I think we -- you know,
21 when they enacted the statute, there was an expectation that
22 in some instances potential wards would not receive counsel.

23 THE COURT: And I'm just -- I guess I'm probing the
24 State's views. If this proceeding lasts for another year
25 before a final judgment, the State doesn't seriously contend

1 that there won't be Utahns who are impacted in the interim?

2 MR. DYMEK: If it lasts another year this bill would
3 have sunset. It sunsets July. I don't know. I don't know.
4 There may be. There are cases where Utahns, respondents, in
5 guardianship proceedings do not receive counsel if those five
6 factors are not met, one of which is on the spot judicial
7 determination that counsel is not needed.

8 THE COURT: What more do the individual plaintiffs
9 here need to assert do you think in order to establish
10 standing to proceed?

11 MR. DYMEK: A lot more. You know, imminent injury.
12 They have not come close. And I think one thing the Court has
13 overlooked is a statement in the brief. I don't think there's
14 even -- at this point I don't think it's plaintiffs' position
15 that their subjective concerns could amount to subjective
16 injury. In docket 54 page 9 footnote 9, it's I think their
17 memorandum in opposition to our motion to dismiss --

18 THE COURT: Page what?

19 MR. DYMEK: Docket 54 page 9 footnote 9. I think
20 I'm using their page numbering as opposed to Pacer's. We had,
21 you know, argued that subjective concerns aren't enough. And
22 in response to that in the memorandum in opposition the
23 plaintiffs made it clear we're not relying on subjective
24 concerns at all. What we're relying on is Katherine and
25 Anthony's, the named plaintiffs, deprivation of counsel.

1 Problem is they have not been deprived counsel, and that
2 certainly is not imminent. I'll let the Court find what I'm
3 referring to before I proceed.

4 THE COURT: So what about the Eleventh Circuit
5 case?

6 MR. DYMEK: The Eleventh Circuit case predated
7 Summers, and even then I think reflected the minority view. I
8 don't think I've seen other cases outside the Eleventh Circuit
9 adopting that view. I did not pursue this but I think I've
10 seen subsequent Eleventh Circuit cases now requiring
11 identified plaintiffs.

12 THE COURT: Calling that holding into question you
13 think?

14 MR. DYMEK: I think so. But I didn't pursue them
15 because we had the Eleventh Circuit in Summers and then we had
16 Judge Parrish very recently in August applying Summers in the
17 context of a case having some similarity to this case. It was
18 a case where a disability advocacy group filed a complaint.
19 They had one named plaintiff. The problem there was that
20 person was not a member of the disability advocacy group.

21 THE COURT: At the time of the filing of the
22 complaint.

23 MR. DYMEK: At the time of the filing of the
24 complaint. And so the result of that determination was the
25 advocacy group did not have any identified member with

1 standing, and Judge Parrish as a result dismissed the case.

2 THE COURT: And it's not that I don't have the most
3 tremendous respect for Judge Parrish, but her view of the same
4 case law that I'm looking at is not binding on me.

5 MR. DYMEK: I agree, but I think --

6 THE COURT: It's persuasive.

7 MR. DYMEK: -- like any persuasive authority I think
8 it was a well reasoned opinion using the very language from
9 Summers that I think you quoted and applying it by its plain
10 terms very logically and reaching I think a conclusion similar
11 to what you have announced as your tentative ruling. So I
12 think her reading is -- and her reasoning is right on, and I
13 think the Court's initial conclusions are right on.

14 THE COURT: What about organizational standing?

15 MR. DYMEK: All right.

16 THE COURT: First, am I wrong that it appears to me
17 that the Center has adequately pled facts that give rise to
18 organizational standing? And then, second, Mr. Virgien says,
19 well, if that's true, we've suffered the harm that's alleged
20 in the complaint and we can proceed with those claims.

21 MR. DYMEK: I disagree with you somewhat, certainly
22 on the scope of things that they have alleged caused an
23 injury.

24 THE COURT: Am I --

25 MR. DYMEK: I think if we break those down some we

1 can maybe whittle away and then refine, you know, where we
2 might disagree and talk about that.

3 THE COURT: Am I unfairly characterizing the State's
4 criticism about the organizational standing showing?

5 MR. DYMEK: I think so. I think I could put it more
6 strongly than the Court did.

7 THE COURT: Let me ask you to do that.

8 MR. DYMEK: Okay. You know, first of all, they --
9 in part of our argument we brought in some evidence. We point
10 to a printout in part of their web page where they say, we,
11 the Disability Law Center, cannot assist people involved in
12 guardianship proceedings.

13 THE COURT: But they've explained what they contend
14 that means. No?

15 MR. DYMEK: Not to my -- not that I saw. You know,
16 I thought they said that we, you know, expend resources in
17 other ways but they were very conclusory on what those other
18 ways were. I don't see any allegation or argument
19 establishing, well, how do you expend your resources in a way,
20 in a non-conclusory way, that's causally related to this -- to
21 the deprivation of counsel? What, if anything, have you done
22 if a person is deprived of their right of counsel?

23 THE COURT: You think that they have to say
24 something more than we've had to expend resources at this
25 stage of the proceeding?

1 MR. DYMEK: Yes.

2 THE COURT: Because the general statement of fact
3 that we've been required to do this as a result of the House
4 Bill 101 is insufficient? You contend in your papers that's a
5 legal conclusion I think, didn't you?

6 MR. DYMEK: In part. And I think, you know, you
7 have to -- you have this plausibility requirement, that for
8 standing you first have to show there's an injury and then
9 that is traceable to the conduct of the defendant.

10 So just asserting that, it's hard to see how any
11 deprivation of counsel is -- you know, has resulted in any
12 injury that's traceable to that deprivation. They've stated
13 in very conclusory terms that we've expended resources, but
14 they haven't provided anything to show that that's traceable
15 to the deprivation of counsel.

16 THE COURT: So track with me in a breach of contract
17 case for a minute. I mean this is the difference between Rule
18 8 and Rule 9 I think, the pro forma pleading that says I have
19 a contract with you. It's this contract. You breached it by
20 not doing this, and as a result I've suffered harm and
21 damages. That claim will always go through a motion to
22 dismiss because you don't have to plead your damages with
23 particularity. At a motion to dismiss stage we assume the
24 truth of that allegation. It is a factual allegation. It is
25 conclusory, I agree, but it's a statement of a fact not law,

1 and it's sufficient at Rule 12 stage.

2 And then the parties can conduct discovery, and you might
3 come back at summary judgment and say, ah-hah, that injury
4 that you're claiming, that was from a third party's conduct
5 not as a result of my breach, and then on we go. But at the
6 pleading stage we don't require that level of particularity
7 for pleadings ordinarily, do we?

8 MR. DYMEK: It may be because the defendants aren't
9 challenging it. But I think under Twombly and Iqbal, if you
10 plead it in such a conclusory manner, it's subject to
11 challenge. Just saying we are injured or we have expended
12 resources as a result of House Bill 101 or something to that
13 effect, that's too conclusory under Twombly and Iqbal. You
14 have to provide some facts to show that that's plausible.
15 Even -- they haven't pled even generally facts showing that
16 for example they -- you know, we have sought appeals, sought
17 to amend the guardianship. What -- no -- there's no pleadings
18 even generally showing any ramifications as a result of a ward
19 not receiving counsel. So that's part of our issue.

20 Part of the issue regarding their allegations and
21 argument is legal. They've argued that we've expended
22 resources in pursuing this lawsuit. That numerous courts have
23 rejected as a basis for standing. You can't -- it's thought
24 to manufacture standing by just claiming the expenditure of
25 resources on the lawsuit.

1 And part of, you know, that argument brought out the
2 concern, because you don't know from what they've alleged in
3 the complaint whether, you know, that simply means resources
4 expended on this lawsuit. They haven't alleged enough to show
5 it's an expenditure of resources that's been legally
6 recognized to be an injury.

7 THE COURT: But if we think about Iqbal and Twombly
8 and if we think about Rule 8, how do you find the answer to
9 that question? It's in your first interrogatory, isn't it? I
10 mean we're at the motion to dismiss stage. All other things
11 being considered equal, everybody is on notice of what's
12 alleged and what's claimed and the basis for it, and that's
13 the purpose of discovery is to flesh those -- I mean I
14 understand your point about the Iqbal and Twombly language
15 about conclusory allegations and legal conclusions, though I'm
16 not sure I've applied them in the way you're saying in any
17 case. I'm thinking more about it.

18 But there's notice here. There's not any prejudice or
19 harm, save for you have to answer a complaint. And you serve
20 interrogatory number one: Describe with -- describe
21 particularly what economic injuries you've suffered as
22 referenced in paragraph 47 of your amended complaint, or
23 whatever. And it's easy to solve, isn't it? If the answer is
24 we haven't, then aren't you right back for summary judgment?
25 This just isn't a problem that is difficult to cure.

1 MR. DYMEK: It's curable, but this is constitutional
2 and we're on a motion to dismiss. You know, we want to, you
3 know, end this case if we can based on Twombly and Iqbal. We
4 don't want to proceed to discovery and all that means and that
5 additional expense. You know, we've made the challenge.
6 We've pointed to the cases that reject, you know, standing
7 based on expenditures for just the lawsuit itself.

8 THE COURT: But --

9 MR. DYMEK: And so we've thrown the gauntlet down.
10 Come back. They've brought in new declarations. They had the
11 opportunity to respond and address our concerns and show the
12 basis of where these expenditures are going to.

13 THE COURT: Or at least generally describe them.

14 MR. DYMEK: Or generally describe them.

15 THE COURT: Sure.

16 MR. DYMEK: You know, so we've raised the challenge,
17 and it's -- you know, on a 12(b)(1), 12(b)(2) you can bring in
18 evidence. So they had the opportunity. They used it for
19 other purposes. I think it's fair game, and I don't think
20 they've met their burden of showing the injury in fact for
21 organizational standing.

22 THE COURT: Assume for a moment that they have.
23 What is the consequence of that? Can the Center proceed with
24 any of the claims in the complaint or the preliminary
25 injunction if it is proceeding strictly with organizational

1 standing?

2 MR. DYMEK: No.

3 THE COURT: Why?

4 MR. DYMEK: All their claims are based on
5 deprivation of counsel. The Disability Law Center has not
6 alleged it ever -- you know, can never even participate in a
7 guardianship proceeding where they would be deprived counsel.
8 All the causes of action are based on the deprivation of
9 counsel. The DLC has not alleged any causes of action based
10 on a violation of its own rights. And that's what the cases
11 say that we've cited, even the case that they cited.

12 THE COURT: Did Mr. Virgien just collapse
13 associational and organizational standing in his argument? I
14 wish I had asked him that question first.

15 MR. DYMEK: I think he did. I think he may have.
16 And --

17 THE COURT: I'll ask him when he comes back up.

18 MR. DYMEK: But I think organizational standing is
19 just like that of an individual applied to an organization.
20 You have standing to assert your own rights. DLC has not
21 covered the second step. They have not -- even if they get by
22 the injury in fact, they have not used it to assert any causes
23 of action based on a violation of their own rights. So
24 there's no organizational standing.

25 THE COURT: It's not clear to me whether they have

1 or they haven't on the face of the complaint. I mean they
2 don't draw this distinction, but I don't know if that's their
3 fault. I don't think -- I thought a lot about this. I don't
4 think the plaintiff is required to anticipate the standing
5 argument that's going to come later and then plead alternative
6 standing theories in a complaint.

7 I think that -- I think a fair reading of their complaint
8 is that they were proceeding on behalf of their constituents,
9 not on behalf of itself, and I don't see facts that are
10 alleged in the complaint that would support injury to the
11 organization in the same way as injuries to their
12 constituents, which I think to be the distinction between
13 associational and organizational claims, standing for claims.
14 So I think I agree with you is what I'm saying, I suppose, but
15 not as artfully as you said it. You can argue with me about
16 it if you want.

17 MR. DYMEK: No. I like that very much.

18 THE COURT: All right.

19 MR. DYMEK: Now, if you -- there's -- I did raise
20 the concern about the propriety of allowing plaintiffs leave
21 to amend.

22 THE COURT: Let's talk about that. Surely there's
23 leave to amend. I agree with you they haven't complied with
24 the local rule that requires a motion with an attached
25 pleading, but we often confront this when we're here the first

1 time together in court. They have no idea what the crazy
2 judge behind the bench is going to come out and say. They
3 don't know what it is they have to fix. They just know that
4 if something is wrong, they've told everybody we'd like a
5 chance to try to fix it. The Tenth Circuit couldn't be more
6 clear about this. We favor the resolution of claims on the
7 merits after a full and fair opportunity to try to present
8 them.

9 They are not required to anticipate what's in my brain.
10 I'm wrong as often as I'm right, but they have to live with
11 it. But if they can fix what I talk about today, they're
12 entitled to a right to do that, don't you think, under just
13 about every concept of the way our rules are supposed to work?

14 MR. DYMEK: That's part of our objection is we don't
15 think their claims are fixable. I don't --

16 THE COURT: That requires me to reach the merits of
17 the claims though, right?

18 MR. DYMEK: It does not. It does not. The other
19 constitutional argument -- we have actually two other main
20 constitutional arguments.

21 THE COURT: Right.

22 MR. DYMEK: Federal question and sovereign
23 immunity.

24 THE COURT: Right.

25 MR. DYMEK: Sovereign immunity, as we've argued, at

1 least on their stand-alone constitutional claims, there's no
2 question that the State of Utah has sovereign immunity to
3 those claims. But even more fundamentally, even if they can
4 establish standing, there's no federal question here, because
5 the -- what they claim is federal violations will not
6 necessarily arise during the course of a guardianship
7 proceeding. And that's -- that was the basis of that
8 argument.

9 THE COURT: I was -- I was -- well, I'll hear more
10 about that. I was unimpressed with that argument in the
11 papers, but maybe I don't fully appreciate the subtly of it.

12 MR. DYMEK: Okay.

13 THE COURT: I will say, and I don't know if this is
14 fair to the parties or not, but I adhere to this rigorously
15 and have since I started this work. It seems to me clear from
16 the Circuit Court that once the Court concludes I'm without
17 jurisdiction, you stop. And it's often helpful for the Court
18 to offer guidance about how other issues might be resolved,
19 but once we're out of jurisdiction, we just -- it's a hard
20 stop. We don't make rulings. We don't make findings that
21 become advisory, right? So if there's not standing, I
22 shouldn't touch these -- I understand you're saying these are
23 also jurisdictional claims.

24 MR. DYMEK: Yes.

25 THE COURT: I mean I understand the efficiency of

1 taking up all of the arguments that might potentially be
2 jurisdictional. I haven't done it before.

3 MR. DYMEK: If you want to officially, you know, say
4 one way or the other whether they can have leave to amend,
5 federal -- addressing the federal question argument, I
6 think --

7 THE COURT: Except I mean one of the -- there's
8 another reason that we sometimes don't do this. Once the --
9 once a plaintiff has the benefit of the pleadings and the
10 briefing and the argument and the citation to authority in
11 response to a motion to dismiss, they take a different
12 approach sometimes to pleading facts or theories that they
13 might advance. So anything that we're talking about then
14 today, if we continue this discussion beyond standing, is
15 hypothetical because what we really need to do is figure out
16 what the next complaint looks like and whether the next
17 complaint poses the same questions in the same way, I think.

18 MR. DYMEK: Well, in -- our argument is regardless
19 of how they amend the complaint, regardless of if they show
20 standing, they cannot proceed. The Court will not have
21 subject matter jurisdiction because there's no federal
22 question. If I could just briefly address that.

23 THE COURT: Would you please.

24 MR. DYMEK: Okay. Say they plead standing based on
25 an anticipated future guardianship proceeding.

1 THE COURT: Well, let's say that they find a
2 plaintiff who is in a guardianship proceeding right now today
3 and yesterday was deprived counsel.

4 MR. DYMEK: Right.

5 THE COURT: Okay.

6 MR. DYMEK: I think -- I think that will be -- you
7 know, still standing will be very difficult there because you
8 simply don't know how the judge is going to rule when he
9 decides on the spot whether the person is entitled to
10 counsel.

11 THE COURT: Well, that's why I'm saying assume that
12 yesterday this hypothetical plaintiff was denied counsel by
13 one of the judges in the Third District Court.

14 MR. DYMEK: Okay. And if that happened, you have
15 Younger Abstention Doctrine, you have the Gromer versus Mack
16 case. You have those cases saying you don't have federal
17 question jurisdiction.

18 THE COURT: Isn't the implication of the State's
19 argument, Judge, you can never answer this question and no
20 plaintiff can ever present it, because if they come too soon,
21 it's a hypothetical harm. And once it's happened you can't be
22 heard. They're asserting a constitutional claim, which I've
23 understood to take precedent over a lot of other sorts of
24 theories.

25 MR. DYMEK: Our argument is you won't be able to or

1 a federal court won't be able to consider their arguments. We
2 have a state court system. Judges there on the spot with a
3 live controversy, they can certainly make the same rulings
4 that plaintiffs are asking you to make. We have a very robust
5 appellate system --

6 THE COURT: That's true.

7 MR. DYMEK: -- as well. So we have a system there
8 that is capable of addressing and answering these questions.

9 THE COURT: Yes.

10 MR. DYMEK: Also the ADA has a set of administrative
11 procedures, that if there are ADA violations alleged, you can
12 file a complaint with the Department of Justice. So there is
13 other options available to plaintiffs. So this is not the
14 only forum available to hear their arguments.

15 Our state courts will give their constitutional arguments
16 due consideration, careful consideration, and our courts care
17 about vindication of a Utah citizen's constitutional rights.

18 THE COURT: Nobody in this courtroom doubts that
19 last thing for a moment. The question is the availability of
20 a federal forum to vindicate federal constitutional and
21 federal statutory claims. And I understand some of the
22 defenses you've raised, but --

23 MR. DYMEK: And ultimately there could be a federal
24 forum. You get through the state system up to the Utah
25 Supreme Court and take it up to the U.S. Supreme Court.

1 That's pretty robust. This might not be the court to decide
2 their arguments.

3 THE COURT: It sometimes isn't.

4 MR. DYMEK: And we believe very strongly this is one
5 such case.

6 THE COURT: Thank you, Mr. Dymek.

7 Mr. Virgien, why don't we hear briefly from you and then
8 we'll take a short recess and I'll consider whether I am
9 prepared to convert a preliminary orientation to a ruling
10 today or whether we should move through to something else.
11 But this question about your argument collapsing potentially
12 associational and organizational standing, help me figure out
13 what space sits between the two if I accept your theory that I
14 thought I understood you to argue at the beginning of this.

15 MR. VIRGIEN: Yes, Your Honor. Tore a page out of
16 Havens Realty. Let me just pull it up. At any rate,
17 the -- thank you. I think that the Havens Realty case is very
18 instructive and important here because this was a case that
19 was decided under the organizational theory purely.

20 And in that case -- I'm looking at star -- at 369 in the
21 Supreme Court Reporter -- or sorry -- in the U.S. Reporter.
22 And the Supreme Court said that Home, the organization here,
23 has alleged injury, and it says that -- what it says here is
24 it asserted that the steering practices of the apartment
25 complex had frustrated the organization's counseling and

1 referral services with a consequent drain on resources. And
2 that's the harm we're talking about here.

3 THE COURT: So what claim could the organization
4 assert?

5 MR. VIRGIEN: Under Havens Realty it was able to
6 assert a claim under I believe the Fair Housing Act. And
7 that's the way in which the Supreme Court framed this
8 organizational theory, that an organization has standing to
9 bring a claim for a harm to its resources, to its purposes.

10 THE COURT: So how would you describe in your own
11 words then the difference between associational standing and
12 organizational standing for purposes of -- is there any
13 difference -- once you're in this door, does it matter
14 which -- let me say this differently. Once you come in this
15 courtroom, does it matter if you walked in through the
16 organizational standing or associational standing door? And
17 if it does matter, how does it matter?

18 MR. VIRGIEN: In this particular case it does not
19 matter. There are ways to, as Your Honor mentioned, ways to
20 achieve standing. In terms of the remedies available, it does
21 not matter. And I believe the Supreme Court has said as much.
22 Your Honor will bear with me for one second. I think Seminole
23 Tribe v. Florida -- I'm sorry. That was a sovereign immunity
24 case. My apologies. That's incorrect, Your Honor. But, at
25 any rate, it is -- the same idea holds true, that here the

1 same remedies are available. This is just a means of
2 establishing an injury in fact for -- for standing purposes.

3 THE COURT: So that seems to me -- I mean if that's
4 the approach, it seems to me that with entities like the
5 Center here -- gosh, I'm just thinking that in these sorts of
6 cases why would anybody come and argue associational standing
7 because there would be such great breadth and so much
8 easier -- you just come in with generalized allegations about,
9 well, our members have suffered, and we've had to expend
10 resources to help, and then I'm here arguing with the State
11 and saying that seems like enough, Rule 12, and then off we go
12 and you've pled your way into discovery in a case. That might
13 not be a very satisfying result in some instances. Didn't we
14 just circumvent the whole point I think of showing the Article
15 III standing by just allowing you to come in the side door and
16 do what you can do coming through the front door?

17 MR. VIRGIEN: I think --

18 THE COURT: When I say you, I mean plaintiffs
19 generally of course. I'm not talking about just the Center.

20 MR. VIRGIEN: Absolutely. There are requirements
21 that must be shown for organizational standing that need not
22 be shown for associational, and I think that's the key here.
23 Associational standing doesn't require any injury to the
24 organization itself. The organization has standing via its
25 members.

1 So there's -- it's very reasonable to imagine -- for
2 example unions bring a lot of associational standing cases.
3 There there might be some labor practice that harms the
4 union's members very clearly where they have an easy standing
5 argument, but it might not be very clear that the association
6 had to actually divert resources to address that.

7 THE COURT: Well, surely there will always be some.
8 I mean if your members are suffering some harm and you're an
9 organization that's designed to serve your members, it seems
10 to me that in virtually every instance somebody will be able
11 to come in and say, well, we had to do -- we had to have three
12 meetings, and we had to supply refreshments, and we had a
13 counselor available, people were very distraught, and we've
14 been -- that sounds like economic harm and you had to take
15 some action and, gosh, that seems okay. But then aren't we
16 just -- haven't we detached ourselves from the inquiry about
17 whether the harms that we're talking about flow from the
18 violations that we're talking about? Have we lost something
19 in causation if we just allow that application of
20 organizational standing?

21 MR. VIRGIEN: Under the case law it's fairly clear,
22 the Havens Realty and the cases that follow it, they don't set
23 some kind of -- I believe Your Honor might be imagining some
24 kind of de minimis exception or some kind of requirement that
25 one not have been harmed a little but somehow a lot.

1 THE COURT: Or directly. I mean directly is what
2 I'm thinking about, the relationship between the right that's
3 at issue and the harm that's alleged to have been suffered. I
4 mean it's one thing to say here is this right that exists.
5 Let's just make one up, gender discrimination in the
6 workplace. And we're a union that represents employees, and
7 here is an employer who fired all of the women or didn't give
8 them raises or promotions. That's a pretty harm -- pretty
9 significant harm, and it's a specific harm. And then the
10 organization comes in and says, well, we had to provide
11 counseling services to our members. That doesn't seem like --
12 for standing purposes it doesn't seem like the sort of harm
13 that we would contemplate flowing from the violation that we
14 have in mind. The law is designed to make sure women are
15 treated fairly in the workplace. You're complaining about you
16 had to pay a counselor \$60 an hour to come for four hours and
17 talk to some employees, but it's sufficient in your mind.
18 That's sufficient to allow the employer, not the employees, to
19 advocate about the employment harm itself.

20 MR. VIRGIEN: Well, the Havens Realty court
21 mentioned something about a frustration of purpose, so there
22 might be some argument in that case that that harm is not
23 related to the purpose of the union here in the hypothetical.

24 I think the more important point I'd like to make though
25 is that's not what's happening here. Here we're dealing with

1 an organization that's statutorily mandated to provide legal
2 services to disabled Utahns, and the harm that the disabled
3 Utahns face is a lack of access to the legal system that
4 results in legal harms that require legal action to be taken.
5 So I understand Your Honor's concerns, but --

6 THE COURT: Mr. Dymek is dying to leap out of his
7 seat and say, well, this is what we don't know because they
8 didn't tell us. They didn't say what the harm is.

9 MR. VIRGIEN: I would like to address that. The
10 complaint first off does mention harm, this type of harm. I'd
11 like to point to paragraph 103 as an example. It states that
12 as a result of defendants' actions, DLC has suffered and will
13 continue to suffer a diversion of limited resources, and it
14 goes on.

15 THE COURT: But Mr. Dymek will say, and did say a
16 minute ago, that's wholly conclusory. That doesn't tell us
17 anything. And insofar as you're talking about having to file
18 this lawsuit, that doesn't count. So what else is it besides
19 being a lobbyist? And when you say denial of counsel, you
20 tell everybody, you tell the world elsewhere you can't do
21 anything about that.

22 MR. VIRGIEN: Right. I have a couple of responses
23 to that. First off, there is a statutory mandate that DLC
24 undertake actions that's not -- that that theory doesn't quite
25 contemplate I think. It's not the DLC wanted to file this

1 lawsuit. It's the DLC had to file this lawsuit. And that is
2 an important distinction.

3 Second, there is a declaration attached to our opposition
4 by Ms. Zahradnikova that does detail, not in -- it doesn't
5 provide a balance sheet or any kind of pecuniary spending. I
6 want to make that clear. But it does detail the causal chain
7 that requires action on DLC's part to deal with the fallout.

8 THE COURT: That was the explanation I had in mind
9 when I said to Mr. Dymek I thought you explained what that
10 meant, and then I wondered -- which paragraph do you have in
11 mind? Is it paragraph 10 of her declaration, the first one?

12 MR. VIRGIEN: It's paragraphs really five through
13 nine of -- this is the declaration in support of our
14 opposition. Paragraph 10 is just attached as an exhibit to
15 that one.

16 THE COURT: Oh, I'm sorry, the second declaration
17 then; is that right? No.

18 MR. VIRGIEN: I think there should only be one
19 declaration in this record. It's docket number 54-1 is what
20 I'm looking at.

21 THE COURT: What's the date of the declaration?

22 MR. VIRGIEN: It was filed September 1st.

23 THE COURT: No, I'm sorry. When was it executed?

24 MR. VIRGIEN: Executed on August 31st. I believe we
25 might have executed multiple declarations that day.

1 THE COURT: Okay. I think I have it with me here.

2 MR. VIRGIEN: All right. Paragraphs five through
3 nine of that declaration kind of walk through the reasoning as
4 to why the harm here would result in an expenditure of
5 resources. And that here is something that goes -- goes
6 beyond what Your Honor is imagining as this we'll call it a
7 de minimis showing of organizational harm. This is a very
8 real and core organizational harm that gets right at DLC's
9 statutory mandate to provide counsel to people who have
10 suffered these kinds of deprivations.

11 THE COURT: The first argument you made proves too
12 much, does it? I mean it can't be -- you say that it's a
13 statutory mandate so we had to file this action and so
14 therefore we have standing to file the action. I think
15 that's -- hasn't the Supreme Court said that Congress can't
16 abrogate the standing requirement? There still has to be an
17 actual controversy and injury. Maybe I'm talking myself in a
18 circle now on this issue, but I understand your second point
19 for sure. Okay.

20 MR. VIRGIEN: And Congress certainly can create a
21 harm, which here the expenditure of resources is a harm that's
22 being alleged and, yes, it's a harm that flows from a
23 statutory mandate but it's nonetheless a harm.

24 THE COURT: But all of these statutory entities,
25 like the Center here, could come in and make the same argument

1 in every case and say, well, we had to file the lawsuit.
2 That's -- I'm not sure that resonates with me. You have an
3 obligation to evaluate claims and assert them in some
4 instances. I understand what you're saying.

5 MR. VIRGIEN: And here it does go beyond merely
6 needing to file this lawsuit. There's a lot of fallout to
7 this denial of counsel that it will fall to the DLC to mop
8 up.

9 THE COURT: Mr. Dymek says put the nail in the
10 coffin today. You can't fix the problems that they've
11 identified. It's incurable. This lawsuit was dead before it
12 was filed, so no amendment. If you lose on standing, what's
13 your response to that?

14 MR. VIRGIEN: That at this stage of the proceedings
15 leave should be freely granted. We mentioned in our
16 opposition that we would like to request leave to amend. As
17 Your Honor mentioned, that is not a motion under the court's
18 local rules, but as Your Honor also mentioned, we did not know
19 the -- assuming there's a defect, we did not know the defect
20 at issue here.

21 THE COURT: There were a lot of arguments made.

22 MR. VIRGIEN: There were a lot of arguments made.

23 THE COURT: It's true. All right. If there's
24 something more you'd like to share, I'm all ears, otherwise,
25 this is a good time probably for a recess.

1 MR. VIRGIEN: I would like to address a couple of
2 points quickly. First, Mr. Dymek mentioned the sunset
3 provision. We cited in our P.I. papers where that issue was
4 raised already in a case called Bowdry v. United that found
5 that a sunset provision alone is not enough to erase the harm
6 that -- that's created. And here it is an optional sunset.

7 I'd also like to point out about the August decision by
8 Judge Parrish I believe that was discussed.

9 THE COURT: In the association case. I forget the
10 other party's name.

11 MR. VIRGIEN: Yeah. It was -- so that court dealt
12 with a situation where this named individual was the only
13 purported member to have suffered a harm. So we face
14 something a little bit different here where the complaint
15 broadly alleges that all members who have gone through
16 guardianship proceedings are necessary -- or constituents --
17 are necessarily constituents and necessarily suffer the harm.
18 So we're not facing an issue where if we lose one particular
19 plaintiff we lose our entire theory of standing.

20 THE COURT: She cited that language in Summers I
21 think. There was discussion about it. And she cited it
22 favorably for the proposition that the Supreme Court has said
23 you have to name somebody individually.

24 MR. VIRGIEN: Yes, but I think both Summers and that
25 particular case did not deal with the situation we face here

1 where there's a well defined class of people who are
2 necessarily harmed and are necessarily constituents. That's
3 something that makes this case unique that takes it outside of
4 both of those theories.

5 I would just like to briefly address the claim that
6 Twombly somehow requires us to plead specific monetary
7 damages. I think that is an argument that's not before the
8 court on this motion to dismiss and it's one that reads to
9 much into Twombly. Post Twombly there's certainly ample case
10 law that allows for damages to be stated and then to be
11 evaluated during discovery.

12 THE COURT: But I think Mr. Dymek would say what
13 they were really saying is if the damages relate to your
14 showing of injury and the question is one of standing not
15 damages on a claim, that it's a different -- different issue.
16 You've got to come forward. You don't have to plead it maybe
17 if it -- anticipate the standing challenge, but once it's
18 made, provide an explanation like you did about other things.
19 I think that's what he said.

20 MR. VIRGIEN: So we're moving away from Twombly into
21 a 12(b)(1) framework.

22 THE COURT: No. He said both, didn't he? All
23 right, fair enough. But what about that? That's a fair
24 criticism of the Center's response, is it not? I mean you
25 submitted declarations talking about other things. You knew

1 that we challenged this as a basis for jurisdiction and
2 standing and you could easily have said we've suffered these
3 harms.

4 MR. VIRGIEN: Yes, but nothing in the case law cited
5 by the Government or otherwise requires specific financial
6 disclosures or things of that nature.

7 THE COURT: I agree with that.

8 MR. VIRGIEN: And that's all I have for the Court.

9 THE COURT: Ms. Sylvester, it occurs to me I've
10 skipped over you twice.

11 MS. SYLVESTER: I was going to bring that up. I
12 think nowhere in this discussion have we talked about the
13 injury that could be redressible by the AOC or the Council.
14 And I'd like an opportunity to at least address that, because
15 if you dismiss nothing else, I think you ought to dismiss us
16 today because there's just nothing that we can redress at this
17 point with their claim.

18 THE COURT: It's your view of course today that --
19 come on up Ms. Sylvester. It's nice to have you back. It's
20 your view of course that I should reach into these other
21 issues even notwithstanding that I might conclude that I lack
22 jurisdiction in the case?

23 MS. SYLVESTER: Well, kind of. I mean I agree that
24 you lack jurisdiction in this case and I think, you know, just
25 briefly addressing redressability, there is none by -- you

1 know, the AOC and the Judicial Council can't do anything in
2 these cases. And what we've argued is that they have
3 conflated implementation of H.B. 101 with applying it in
4 individual cases and that just doesn't make any sense. We
5 don't tell the judges what to do. I mean you know this. If
6 you had staff coming in telling you what to do, you'd --

7 THE COURT: They do constantly.

8 MS. SYLVESTER: You know, but not with the intention
9 of interfering with your individual discretion in an
10 individual case. And I think that's our biggest concern is
11 that we don't -- the only thing that we did to implement this
12 legislation -- implement, I use that in quotes because that's
13 not really a good word, although Brent Johnson is here and
14 probably regretting that he used that in his letter.
15 Basically what it means is that we educated the judges on what
16 happened with H.B. 101. We created a form, happy to take that
17 down if the Court so determines that we should, and then
18 updated some bench books and basically had, you know, some
19 legislative updates on this, you know, created a bench guard
20 and said this is what the statute says, but that's it. So I
21 think it's just inappropriate for us to be here.

22 THE COURT: So let me reframe the question. Let's
23 see if I can state it more artfully now than I did with
24 Mr. Dymek. Doesn't the question become this. If I
25 conclude -- and I think I'm going to, though I'm not certain

1 of it until I sit down and think for a minute more. But if I
2 conclude today that there's not a basis to proceed, that we
3 haven't established standing in any manner that allows me to
4 reach the merits, and I conclude that at this stage of the
5 proceeding I'm going to allow amendment, then isn't the most
6 prudent course to wait and see what comes back from the
7 plaintiff and what modifications are made to the pleading,
8 whether the same claims are asserted, against the same
9 parties, or different parties, or different claims, supported
10 by different allegations, or different theories, and then take
11 up the issue of whether it's sufficient or not?

12 I mean the arguments you're making now, we could answer
13 them today, like I said to Mr. Dymek, but we might have a
14 different set of issues before us next week, and now
15 everything I've said was advisory because it wasn't necessary
16 to the determination of the motion to dismiss and it didn't
17 finally resolve the issue that would be before us.

18 That may be the wrong way to think about it but why isn't
19 that right? I mean Mr. Virgien and Ms. Schranz are bright
20 folks. They work with some bright folks at the Center and
21 they've been in court before and they've read the arguments
22 now. They've seen a forecast. They've read some cases. They
23 might think you're all wrong and come back and say the same
24 thing. But then the harm to the court is you come back and
25 say now we're here. Now take up our argument. And it's not

1 much harm for a defendant, is it?

2 MS. SYLVESTER: I suppose not. It's a few more
3 hours of me rewriting the same answer to the briefs.

4 THE COURT: You get to come back here.

5 MS. SYLVESTER: I don't know how this could possibly
6 change. You know, I think it's fatal to begin with. I mean
7 maybe they have some kind of colorable argument against the
8 State, but what are they going possibly do with us? You know
9 we're not -- unless they're going through an individual case
10 and going after one of our individual judges about a decision
11 they made, the AOC and Council have absolutely nothing to do
12 with H.B. 101. We were simply educating about it. I can't
13 even think in my right mind what we could possibly redress by
14 having a judgment from this Court.

15 And I just -- I don't think that -- you know, although,
16 you know, maybe you could give them leave to amend and the
17 State could respond, I just think that our motion to dismiss
18 should be granted today. I just don't think it's a good use
19 of the Court's time to have us come back and argue the same
20 points we're going to argue next time.

21 THE COURT: I understand completely.

22 MS. SYLVESTER: I appreciate that.

23 THE COURT: All right. Thank you, Ms. Sylvester.

24 MS. SYLVESTER: Thank you.

25 THE COURT: We'll take --

1 You'd like to add something.

2 MR. VIRGIEN: Briefly, Your Honor. Just to very
3 quickly address that point about redressability here. We
4 think that at most there's a fact dispute at this point on
5 redressability that needs to be answered before we can
6 proceed. There's evidence in the record that the AOC and J.C.
7 have admitted that they implement this program. There's
8 evidence in the record that they have an ADA program that
9 they -- that they're the administrators for, and those are
10 claims that simply cannot be brought in state court, the ADA
11 claims as some kind of counterclaim. This is the proper forum
12 to resolve those and the proper defendants, and the same
13 applies for the constitutional claims.

14 THE COURT: I think I was left with an impression,
15 and I can't point to anything specific, but I think I walked
16 away from the papers with an impression that the Center, if we
17 were moving forward, cared to reevaluate whether the courts
18 were a proper party in the case. I'm not going to press you
19 today and ask you for an answer to that, though I will say
20 that you have Ms. Sylvester's phone number and I'm sure she'd
21 be happy to talk to you about anything that you want to know
22 before there's an amendment.

23 MR. VIRGIEN: Thank you, Your Honor. One additional
24 point I'd like to make, which is that we are prepared to argue
25 the preliminary injunction today. I understand that if the

1 Court has no jurisdiction over the case it has no jurisdiction
2 to enter a preliminary injunction. But to the extent the
3 Court is willing to allow leave to amend, we'd request to be
4 able to argue the preliminary injunction and the Court could
5 consider it for a later point when it would determine it has
6 jurisdiction.

7 THE COURT: Okay.

8 MR. VIRGIEN: Thank you.

9 MR. DYMEK: Your Honor, before you go back, if I
10 could just very briefly?

11 THE COURT: That's what we're here for. We'll hear
12 anything you'd like to share.

13 MR. DYMEK: Thank you, Your Honor.

14 THE COURT: This is the time for it.

15 MR. DYMEK: I just want to make the point that, you
16 know, if you're inclined to amend, the -- or allow leave to
17 amend, let's have them follow the local rule. It's not just a
18 technical requirement in this case. I'd proffer that we could
19 make a strong argument that any amendment is futile based on
20 what we've already briefed. The Medtronic, Devon Energy case,
21 you know, deal with declaratory judgments, people who have not
22 actually had their rights violated. You would just reframe it
23 as -- as it -- as a proceeding -- as a hypothetical proceeding
24 and ask the question does the federal question necessarily
25 arise in the course of that proceeding? It's clear I think

1 because you have the judicial determination that's
2 unpredictable that the federal question would not necessarily
3 arise because you cannot predict whether or not the judge will
4 appoint counsel.

5 And then for potential wards who don't receive counsel or
6 have been through the entire proceeding and had a guardianship
7 placed on them, you have doctrines like the Younger Abstention
8 doctrine, the Rooker-Feldman doctrine where those ongoing and
9 state proceedings and then cases that have reached final
10 judgment aren't subject to federal court review.

11 So I think if we go through that procedure, it will serve
12 an important purpose and avoid having to go through the motion
13 to dismiss and preliminary injunction arguments all over
14 again.

15 THE COURT: Won't we have exactly the same arguments
16 either way? I mean the issues will be the same, and the
17 question will be whether they're granted leave to file the
18 amended complaint or whether the amended complaint they file
19 is dismissed? I mean I don't -- maybe there's some additional
20 benefit I'm not contemplating. In some cases there is a
21 strong benefit to following the local rule.

22 MR. DYMEK: I think it will be much more narrow.
23 We'll focus only on the arguments that make it futile, other
24 than, you know, other arguments.

25 THE COURT: Isn't the problem with that that -- that

1 it can actually add a layer of briefing? They filed a motion
2 for leave to file their amended complaint. You oppose,
3 raising some but not all of the arguments you'd raise in a
4 motion to dismiss. Say you lose. They file the motion -- the
5 amended complaint. Now you file a motion to dismiss and we're
6 just -- isn't that three visits instead of two?

7 MR. DYMEK: If you have to go to the next step. We
8 think the first step --

9 THE COURT: I know you do.

10 MR. DYMEK: -- will render it unnecessary.

11 THE COURT: I understand. Thank you.

12 MR. DYMEK: Thank you, Your Honor.

13 THE COURT: All right. Why don't we come back at
14 3:00 o'clock. Thank you. We'll be in recess.

15 (RECESS FROM 2:41 P.M. UNTIL 3:25 P.M.)

16 THE COURT: All right, thank you. All right.
17 Thanks everyone for your patience. That was interesting. You
18 know, in the papers I went back to make sure I hadn't missed
19 some part of this discussion. This is -- it's not unusual
20 that this would happen, it's not common, but this distinction
21 between organizational standing and associational standing and
22 what the implications are garners very little attention in the
23 papers. In fact, it really sort of -- I went back and reading
24 some of the case law, especially Havens, I don't think it's an
25 issue that is often addressed by courts either. I think

1 parties themselves sort of blur some of these edges.

2 I will say I don't know that it matters, because
3 Mr. Virgien said in our earlier discussion that if the
4 individuals -- if their claims fall for failure to establish
5 standing, and I conclude the Center doesn't -- hasn't
6 established associational standing, what I heard Mr. Virgien
7 say is he'd like to amend anyway. And that's where we are one
8 way or the other.

9 Though I will say, and I'll provide a more detailed
10 ruling in a moment, rereading Havens I'm reminded of two
11 things. Number one -- but part of it's not in Havens. It's
12 in a secondary source and other cases that predate Havens, so
13 this is unfair. It's not in the papers. None of you know
14 about it. That the courts recognize the Fair Housing Act has
15 a broader implementation than I think the ADA or the
16 Rehabilitation Act have.

17 The Fair Housing Act affirmatively enables aggrieved
18 persons to bring actions, including third parties like tenants
19 who were not the subject of racial discrimination but as a
20 result didn't have diverse housing, and other entities
21 specifically have standing under the Fair Housing Act to
22 assert claims. So it's a different animal to begin with.
23 It's a different inquiry I think potentially. I didn't read
24 this in a case, but it makes sense to me, where the ADA and
25 the Rehabilitation Act talk about claims brought by disabled

1 individuals, not more generally aggrieved persons. But I
2 don't know. You didn't all have the opportunity to brief that
3 issue.

4 Second, rereading Havens, and especially the critical
5 passage, Mr. Virglen, I think -- I wonder if I draw -- no. I
6 know I draw a different conclusion than you do. The fact that
7 the court's talking about a difference between what it styled
8 the representative claims and the individual claims of the
9 entity I think draws attention to this idea that the court
10 viewed them differently. That term, representative claims, I
11 think it must be dated. That's an '82 decision, and that's
12 not a term that's used a lot I don't think in the modern cases
13 talking about this, but it's a good way to think about it.
14 It's the way I was conceiving of it, that the associational
15 standing gives rise to assert somebody else's claims.

16 I do think -- I continue to disagree with the State I
17 think -- that the Center has alleged facts that would give
18 rise to standing, organizational standing to assert the
19 organizational claims. But then I'm thinking about what that
20 means, and I think, as in Havens, the claim that went forward
21 for the organization there was the claim for monetary damages
22 that the organization suffered, not injunctive claims and not
23 representative claims but claims for monetary damages related
24 to the provision of counseling and other things. So those are
25 the injuries, the concrete particularized injuries that give

1 rise to the organization's claim for the -- to redress the
2 organizational injury, monetary damages, I think.

3 Again, I don't have the benefit of your evaluation of the
4 case law to know if that's really true, but that's how I read
5 it. And what Havens didn't say is now because you have an
6 individual claim for the organization, now you can come back
7 and reassert the representative claims that you said you
8 didn't have. I think they were dismissed voluntarily there so
9 I don't want to say the court said you don't have them.

10 But why even have that discussion if you could assert all
11 of the claims under either basis for standing? It doesn't
12 resonate with me as something that makes sense. It won't
13 matter because you're going to amend. But I am going to
14 conclude, for the reasons I'm about to state, that we don't
15 have on the record before me adequate basis to establish
16 individual standing for the individual plaintiffs or
17 associational standing for the Center, but we are going to
18 allow amendment.

19 I'm not going to reach the arguments, the additional
20 arguments, advanced by the State and the courts today for the
21 reason that, number one, I don't know whether they'll be here
22 when we come to them next time, and, number two, I don't know
23 what they'll look like. And I understand both the State and
24 the courts think that there's no conceivable way to fashion a
25 claim, but I don't know that, and I don't lawyer for the

1 parties. We'll see what the bright minds on the other side of
2 the courtroom come up with if they decide to assert claims at
3 all against the courts or the State and what fashion. So
4 we'll take up those in turn.

5 But, similarly, Mr. Virgien, I'm going to decline your
6 opportunity to preargue the preliminary injunction because we
7 won't know until we get back here again and consider motions
8 which claims will be alive, which is essential to determining
9 whether there's been a sufficient showing and then what relief
10 you'd be entitled to. So any argument we had today just would
11 not -- it just would not be very helpful. So I appreciate
12 that everybody would like to argue additional issues. I think
13 I'm out of jurisdiction so I'm going to stop.

14 Except that I'm going to try to provide you some
15 explanation for the basis of my ruling to the extent that it's
16 helpful to all of you. Let me save your hands some cramping.
17 I'm not going to ask anybody to prepare an order and submit
18 it. We'll file a minute entry that will refer to this portion
19 of the transcript as the Court's ruling and the basis for the
20 ruling so that all of you don't need to concern yourselves
21 with it, but you'll have the transcript to aid you as you
22 think about the case moving forward.

23 So by way of background, this is the Court's ruling in
24 Disability Law Center versus Utah and others. The Court's
25 reaching in this ruling the defendants' motions to dismiss, I

1 suppose the other motions as well insofar as the other motions
2 that are pending I think are now denied as moot and we'll have
3 amendment as explained.

4 But with respect to dockets number 36 and 42, the motions
5 to dismiss filed by the defendants, this is the Court's
6 ruling. Plaintiffs Disability Law Center, Katherine C., and
7 Anthony M., brought this action against the State of Utah, the
8 Utah Judicial Council, and the Utah Administrative Office of
9 the Courts.

10 Plaintiffs assert generally that House Bill 101, a Utah
11 law restricting entitlement to counsel in guardianship
12 proceedings, violates the Americans With Disabilities Act, the
13 Rehabilitation Act, and the Due Process Clause.

14 Plaintiff Disability Law Center is a private, non-profit
15 organization designated by statute to bring legal challenges
16 to protect the rights of Utahns with disabilities.

17 Plaintiff Anthony M. is a custodian with intellectual
18 disabilities whose parents have expressed a desire to obtain
19 legal guardianship over him.

20 Plaintiff Katherine C. is a law clerk who suffers from
21 paranoid schizophrenia and fears her parents will seek to
22 obtain legal guardianship over her.

23 Plaintiffs seek, among other things, a preliminary
24 injunction enjoining the enforcement of House Bill 101 through
25 the resolution of this case. They seek additional relief as

1 well.

2 Plaintiffs -- excuse me. Defendants have filed motions
3 to dismiss challenging, among other things, the plaintiffs'
4 standing to sue. And that is the singular issue that I will
5 resolve today as it is determinative at this stage of the
6 proceeding and because standing is a threshold jurisdictional
7 requirement, so said the Supreme Court in *United Food versus*
8 *Brown*, 1996.

9 The test to establish standing is familiar to the parties
10 from *Lujan*, the Supreme Court's 1992 decision. In order to
11 demonstrate standing to sue a plaintiff must show, number one,
12 it has suffered an injury in fact; number two, the injury is
13 traceable to the alleged conduct of the defendant; and, number
14 three, the injury is likely to be redressed by a favorable
15 decision.

16 Plaintiffs have asserted standing under three separate
17 theories: The individual standing of plaintiffs Katherine and
18 Anthony in their individual capacities, the Center's
19 associational standing to assert what I'm -- now I'm using my
20 words and not theirs -- but representative claims of their
21 constituents and, third, the Center's organizational standing.
22 And I'll take each up in turn beginning with individual
23 standing.

24 In their complaint, plaintiffs allege that plaintiffs
25 Katherine and Anthony have standing to sue under the ADA, the

1 Rehabilitation Act, and the Fourteenth Amendment, because they
2 are disabled individuals and they cannot fully participate in
3 a guardianship proceeding without an attorney representative.
4 Plaintiffs argue for that reason that implementation of House
5 Bill 101, which removes a guarantee of counsel in those
6 proceedings, therefore violates their rights.

7 The complaint alleges that Anthony's parents have
8 expressed a desire to obtain legal guardianship over him at
9 sometime in the future, and Katherine's parents express
10 concern about her ability to function autonomously, causing
11 her to fear they will seek a guardianship over her at some
12 point in the future. However, there are no allegations that
13 the individual plaintiffs have actually participated in any
14 guardianship proceedings or that any such proceedings have
15 been initiated.

16 In their motions to dismiss, the defendants contend that
17 these allegations by themselves fail to demonstrate that
18 either plaintiff has suffered an injury in fact because any
19 denial of counsel under House Bill 101 is speculative and
20 likely to happen, if at all, only at some point in the future,
21 and for that reason in either instance is the denial of
22 counsel or the injury imminent.

23 Plaintiffs disagree, arguing that a deprivation related
24 to a legal proceeding that has not yet commenced, and in fact
25 may never commence, can still constitute an injury in fact, so

1 here the possibility and the reasonable apprehension of the
2 possibility that the plaintiffs will be subject to
3 guardianship proceedings without a guarantee of counsel itself
4 is sufficient to constitute an injury in fact.

5 I part ways I think with the plaintiffs on this point and
6 am unable to find case law that I think squarely supports the
7 plaintiffs' proposition that really what is speculative and
8 potentially remote injury can qualify as an injury in fact for
9 purposes of Article III standing.

10 And I read the cases submitted by the plaintiffs
11 differently I think than they do, at least in part. And the
12 plaintiffs rely primarily on three Tenth Circuit decisions.
13 In *Protocols versus Leavitt* from 2008, for example, that case
14 involved a Medicare settlement consultant suing an agency
15 after the agency issued a memorandum that conflicted with
16 previous guidance about settlements. And the plaintiff there
17 alleged that because of the memorandum, it was possible, if
18 not likely, that in the future it would be forced to repay
19 some of the fees it collected based on settlements it had
20 previously arranged based on the prior policy or guidance.

21 The consultant also alleged that at the time of the
22 filing of the suit, the company had decreased in value because
23 of the potential repayments, also that it was hampered in its
24 ability to budget for the future, and it had postponed talks
25 with potential investors who were concerned about the

1 potential repayments.

2 The Tenth Circuit concluded that that plaintiff had
3 standing because even though the direct harm, that is, whether
4 the plaintiff would at some point in the future be forced to
5 repay fees it had already received, even though that harm, the
6 direct harm, was speculative and not certain to occur, the
7 plaintiff had alleged that it had decreased in value and had
8 been forced to change its behavior because of the new
9 memorandum that issued, both of which the Tenth Circuit
10 concluded were present, concrete harms.

11 Similarly, in U.S. versus Supreme Court of New Mexico,
12 another Tenth Circuit decision, this one from last year, the
13 United States sued various defendants over a New Mexico Rule
14 of Professional Conduct that exposed prosecutors to
15 disciplinary violations for improperly subpoenaing lawyers to
16 testify before grand juries about former clients. The United
17 States there alleged the prosecutors had changed their
18 practices with respect to those proceedings out of fear of
19 disciplinary proceedings, including resulting from -- excuse
20 me -- and that the changed practices, rather, included, among
21 other things, issuing fewer subpoenas.

22 Again the Tenth Circuit concluded that there was
23 standing, this time for the United States as plaintiff,
24 because notwithstanding that no prosecutors had actually been
25 subject to disciplinary proceedings, that the United States

1 had alleged that the prosecutors had been forced to make
2 present changes in their behavior motivated by fear resulting
3 from the new rule.

4 Finally, in Cressman versus Thompson, the Oklahoma
5 license plate case we talked about earlier from 2013, Oklahoma
6 changed its default license plate to include an image of a
7 Native American, and a citizen protested on First Amendment
8 grounds contending that he was compelled either to display the
9 plate, even though he believed it violated his speech rights,
10 or purchase a specialty plate, or cover up the image and risk
11 prosecution.

12 Again, the Tenth Circuit concluded that each of these
13 options represented an injury in fact. And there the court
14 explained that at least as to the last point, even though
15 Cressman had not yet violated the law by covering the image,
16 the threat of future prosecution for doing so had caused a
17 present change in his behavior and had caused him to refrain
18 from exercising his First Amendment speech rights.

19 The complaint in this case alleges only that the
20 individual plaintiffs fear being subjected to guardianship
21 proceedings at some point in the future. Nowhere in the
22 complaint do the plaintiffs allege, as in the cases that they
23 cite, that they are presently injured by House Bill 101, or
24 that they have changed their current behavior in some
25 meaningful way on account of the law.

1 As such, at least in my judgment, the individual
2 plaintiffs, Anthony and Katherine, have failed to meet their
3 burden to establish standing by virtue of failing to
4 adequately plead an injury in fact, and the defendants' motion
5 to dismiss their claims is granted without prejudice to
6 refiling an amended complaint.

7 I think I said something I didn't quite mean to say. I
8 said having pled an injury in fact, and on this point we had
9 some discussion about this earlier, I think a plaintiff can
10 come forward with evidence to support a showing of standing,
11 not -- need not rest just on the allegations in the complaint,
12 but there were not additional allegations here beyond those in
13 the complaint in support of the individual plaintiffs so it's
14 the same for those purposes.

15 Turning to associational standing and adopting the
16 language of the Supreme Court case in Havens, the
17 representative claims, I'll address the Center's allegations
18 that it has associational standing to sue on behalf of
19 Anthony, Katherine, and prospective disabled wards in
20 guardianship proceedings who are the Center's constituents.

21 An association like the Disability Law Center can of
22 course have standing to sue on behalf of its members so long
23 as it meets what are generally known as the three Hunt
24 factors: First, that its members would otherwise have
25 standing to sue on their own; second, the interests the

1 organization seeks to protect are germane to the
2 organizational -- excuse me -- the organization's purpose;
3 and, third, that the suit does not require the individual
4 participation of the organization's members. This comes from
5 the Supreme Court case Hunt versus Washington State Apple
6 Advertising Commission, 1977.

7 The defendants contend that the Center fails to meet
8 these requirements because its complaint does not allege that
9 any of its members have standing to sue on their own. The
10 Center again disagrees, arguing that Katherine and Anthony are
11 members and have standing, and that it also alleges injuries
12 on behalf of other unnamed constituents who are by definition
13 disabled Utahns deprived of the guarantee of counsel who have
14 standing to sue.

15 I've already concluded that Katherine and Anthony do not
16 otherwise have individual standing to sue so I will instead
17 focus now on the allegations related to disabled Utahns
18 deprived of the guarantee of counsel, allegations, that is,
19 having made no finding one way or the other about whether
20 there is such a right.

21 But after reviewing the complaint and various
22 declarations subsequently filed by the Center, I conclude that
23 these allegations are insufficient to support the Disability
24 Law Center's associational standing.

25 Plaintiffs' complaint alleges only that its constituents,

1 Utahns with disabilities, quote, have each suffered injuries,
2 or are at risk of suffering injuries, that would allow them to
3 bring suit against defendants in their own right. That's
4 paragraph 20 from the complaint.

5 And as I view it, there are at least two problems with
6 that allegation. First, without Katherine and Anthony there
7 is no named constituent in the complaint. And while it's not
8 a direct holding, it is language from the Supreme Court and
9 language that one of my colleagues in this court has relied
10 upon. I understand the Supreme Court to be a superior court
11 to this one and so I follow it.

12 The Supreme Court stated, of course, in Summers versus
13 Earth Island Institute in 2009 that organizations seeking to
14 sue under associational standing must, quote, make specific
15 allegations establishing that at least one identified member
16 has suffered or would suffer harm, end quote.

17 And that makes sense to me, because without naming a
18 constituent, it would be difficult to assess whether any
19 specific constituent has suffered an injury in fact. And I'm
20 not unpersuaded by Mr. Virglen's logical argument here that
21 assuming that's a legal theory that makes sense in most cases,
22 it's unnecessary here just by operation of the definitions
23 that apply, so that we're certain to have injury, and yet I
24 haven't read any court to make an exception to this rule, save
25 possibly in the Eleventh Circuit as we talked about. And I

1 think the rule is a good rule that makes sense in
2 associational standing cases. I'll follow the plain language
3 quoted from the Supreme Court.

4 But, second, there's no allegation in the complaint that
5 any unnamed constituents have suffered or will suffer any
6 imminent harm. As I mentioned, with respect to Katherine and
7 Anthony, the Center must allege its constituents have suffered
8 past or imminent future injury, yet there are no allegations
9 in the complaint that any unnamed members or constituents face
10 an imminent guardianship proceeding.

11 I think that's a necessary allegation, and as the party
12 with the burden, the burden is with the Center to at least
13 supply those allegations, which at this stage of the
14 proceeding would be assumed true provided there's a basis for
15 them.

16 And I'll note that those allegations, again, don't have
17 to appear in the complaint itself. The Court has discretion
18 to consider affidavits and other materials of record before
19 dismissing a complaint for lack of standing. That's Warth
20 versus Seldin, Supreme Court 1975, but at least the allegation
21 has to appear in the record. I don't think it does here
22 except by inference, and I'm not sure that's proper in this
23 circumstance.

24 To that end though, talking about evidentiary materials,
25 the plaintiffs submitted two declarations stating that a

1 Disability Law Center member witnessed guardianship
2 proceedings where the respondent was not given counsel. At
3 least in my judgment those allegations themselves do not cure
4 the defects in the complaint. For one, they don't name any
5 individual constituent. And I'll note that it's not entirely
6 clear whether that constituent has to be named in the
7 complaint, even assuming it's a requirement for associational
8 standing, or whether a plaintiff can name a constituent in a
9 subsequent declaration. But because there isn't one named
10 anywhere here, save for Katherine and Anthony, that's not a
11 question we have to resolve today.

12 But, second, the declarations submitted do not allege
13 that the respondents in the guardianship proceedings that were
14 viewed were Disability Law Center constituents, which is
15 required under the first factor in the Hunt analysis.

16 And I understood from Mr. Virgilen's argument today that
17 that is almost certainly necessarily the case. And I
18 understand that argument that flows through the papers, but I
19 don't understand where there's a basis for that understanding
20 in the record before me, and I'm confined to the record before
21 me.

22 In sum, at least in my judgment, the allegations in the
23 complaint and those in the subsequent declarations do not
24 individually or collectively sufficiently allege facts to
25 support associational standing, and for that reason the

1 defendants' motion to dismiss the Center's associational -- at
2 least the representative claims asserted by the Center, that
3 motion to dismiss is granted, without prejudice to refile or
4 amend.

5 Turning finally to organizational standing, the Center
6 argues that it has properly alleged organizational standing.
7 And just as an individual may bring suit, so to may an
8 organization, and the inquiry is the same, whether the
9 organization has alleged such a personal stake in the outcome
10 of the controversy as to warrant its invocation of federal
11 court jurisdiction. That's the Havens case, the Supreme Court
12 1982.

13 The Center contends it has standing in its own right
14 because it has diverted resources to advocate in opposition to
15 House Bill 101, and because it has diverted funds to provide
16 legal assistance to those who have been denied counsel. In
17 fact it alleges, I think correctly, that under the statute
18 it's required to do so.

19 I will just note -- briefly note I think that the Center
20 also argues in its papers that House Bill 101 at least has
21 impeded its ability to carry out its statutory mission, but I
22 don't think that theory is sufficiently supported by
23 allegations in the complaint.

24 The essence of the defendants' argument in their motions
25 to dismiss, I think with some clarity hearing from Mr. Dymek

1 today, but essentially the complaint is twofold. One is an
2 Iqbal/Twombly concern and the second is that there's
3 insufficient allegation in the complaint concerning the
4 specific damages suffered by the Center. I guess they're two
5 sides of the same coin, those two arguments.

6 But I just disagree with the State. I think that a claim
7 for damages like the kind that are asserted here, assuming
8 they were seeking economic relief, which isn't clear from the
9 complaint, are sufficient I think ordinarily to move forward.
10 There's not a heightened pleading standard that applies here
11 to damages or any other element of the claim.

12 And indeed the Supreme Court has already explained that
13 general allegations that an organization had to devote
14 resources in response to a defendant's conduct can be
15 sufficient at this stage of the proceeding to assert an
16 organizational standing theory. And I just read it again in
17 Havens, the 1982 case from the Supreme Court.

18 Here the Center alleges that House Bill 101 has caused it
19 to expend resources it otherwise would not have expended.
20 Defendants, if they wish, and if the case survives into
21 discovery, will have an opportunity to discover the facts
22 behind those allegations and later an opportunity to challenge
23 the sufficiency of those claims if we get to that point. But
24 for the time being, in my view those allegations are
25 sufficient to allege organizational standing to sue.

1 But then as I said earlier, at least in my view, the
2 organizational claim is different from the representative
3 claim that could be asserted in an associational standing
4 capacity. And I don't read the complaint to support relief
5 for the specific injuries the association has suffered, at
6 least as the allegations are pled in the complaint, but, in
7 any event, it will be repled.

8 For those reasons, I grant the defendants' motions to
9 dismiss without prejudice to the plaintiffs amending their
10 complaints. The remaining motions are denied moot in view of
11 that ruling.

12 And, Mr. Virgien, I suppose I'd like to visit with you
13 about a timeline for filing an amended complaint. Let me
14 further clarify. I'm going to decline the State's invitation
15 to rigorously adhere to our local rule here. Just in the
16 interest of efficiency let's do this once and not twice. And
17 so you need not file a motion for leave. I'm granting you
18 leave. When will you file?

19 MR. VIRGIEN: I think 30 days, Your Honor, should be
20 sufficient.

21 THE COURT: Terrific. So within 30 days of today
22 we'll have an amended pleading from the plaintiffs, some or
23 all of the plaintiffs. There's no prejudice to adding new
24 plaintiffs or parties if you wish. You don't have to bring
25 all these folks back if you don't want to. It's not really a

1 hint, but call Ms. Sylvester. Okay. And then we'll just have
2 responses from the defendants in the normal time and sequence
3 under the rules.

4 Notwithstanding any objections any of you may have to
5 that ruling, what questions do you have or what else should we
6 take up while we're here?

7 Mr. Dymek?

8 MR. DYMEK: No questions, Your Honor.

9 THE COURT: Ms. Sylvester?

10 MS. SYLVESTER: None from me, thank you.

11 MR. VIRGIEN: None from us also.

12 THE COURT: Well, I appreciate all your patience,
13 counsel, also your briefing, which was extremely helpful, as
14 was your argument today.

15 Have I forgotten something, Mr. Lee? You're looking at
16 me.

17 Thank you. We'll be in recess.

18 (HEARING CONCLUDED AT 3:57 P.M.)

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Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Disability Law Center, et al. Vs. The State of Utah, et al., case No. 2:17-CV-748, in said court, on the 1st day of November, 2017.

I further certify that the foregoing pages constitute the official transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 8th day of November, 2017.

/s/ Raymond P. Fenlon